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ERRATA.

CIVIL RULINGS.

Page 153, col. 1, line 2 of Marginal Note. *For* "impartiality" *read* "partiality."

Page 227, col. 2, line 5. *For* "who" *read* "which."

Page 387, col. 1, line 3 of Marginal Note. *For* "disputed" *read* "deposited."

ACT X RULINGS.

Page 22, line 10 of Marginal Note. *For* "case" *read* "lease."

Page 57, Marginal Note. *For* "reviving under Section 58 Act X of 1859 an ex-parte decree," *read* "reviving a suit under Section 58 Act X of 1859 by setting aside an ex-parte decree."

Page 119, col. 1, line 2 of the Marginal Note. *For* "assess land as his lakheraj land," *read* "assess lakheraj land," *striking out* "land as his."

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(5) Whenever a prisoner is put on his trial he is entitled to have the — examined *de novo* if he has previously given evidence on the trial of another prisoner in the same case; and it is not sufficient to require the — to identify the prisoner and to read over to him his former examination and require him to attest it ... 38

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Appellate High Court,

CIVIL RULINGS.

1864.

The 4th January 1864.

Present:

The Hon'ble H. V. Bayley, *Judge.*

Joint Hindoo Family—Onus probandi —Allegation of separation, &c.

Case No. 617 of 1863.

Application for review of Judgment passed by the Hon'ble Justices Bayley and Roberts on the 28th July 1863, *in Regular Appeal No.* 297 *of* 1861.

Mussamut Bilash Koonwar (Appellant) *Petitioner,*

versus

Baboo Bhawanee Buksh Narain and others (Respondents) *Opposite party.*

Baboo Luckee Churn Bose for Petitioner.

The original *status* of all Hindoo families must be presumed to be joint and undivided. The *onus probandi* is on those who put forward claims upon the basis of separation and self-acquisition. Proof of separation of shares is not sufficient to shift the burden of proof.

The learned Counsel, who has appeared for the applicant, has urged that, in this case, there was quite sufficient evidence to show a *primâ facie* case of separation, and, as between the co-parceners, partition of shares; that there may be a recognized division of shares between co-parceners without a joint estate necessarily ceasing to exist for revenue or other purposes; that the separation contemplated by Hindoo Law was either of food, family, or shares, and that the word "separation" was used in respect to these *shares* distinctly from the use of it in respect to *estate*; that thus, in the present case, it being shewn that there was a separation of shares, it was for the opposite party not simply to rely upon the presumption of a joint undivided estate being sufficient to give the widow no more than maintenance according to the Mitackshara Law, but that it was also for the opposite party to clearly rebut the proof given that there was such sort of separation as by the Mitackshara Hindoo Law would entitle the widow to be considered an heir. Verse 4, p. 372 of Mitackshara, Section 30 Chapter XI of Dyabhaga, Sections 436 and 437 of Elberling's Treatise, and p. 20 Volume I of Macnaghten's Hindoo Law, are cited in support of this argument.

I do not see that the argument is sound, or the authorities applicable. Upon the facts of this case, we have held it clearly proved, not only that here there was to be rebutted by the applicant a presumption of a joint undivided Hindoo family, but that there was also sufficient evidence that the property was in no way divided in that sense in which, under the ordinary construction of the Hindoo Law of Mitackshara, would entitle the widow to be considered as heir. The few detached sentences of doubtful construction which have been cited are of no weight against the general broad principle, that the original *status* of all Hindoo families is joint and undivided; and that those, who wish to put forward claims upon the basis of separation and self-acquisition, must most clearly prove those last allegations. Such proof not being in my opinion given by the applicant in this case, I reject the application.

N. B.—The decisions of 1864 which are printed in the Special Number of the Weekly Reporter, are omitted from the present series.

A

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The 5th January 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell,

Judges.

Limitation (Regulation III 1793)—Pendency of suit by Guardian of Minor non-suited.

Case No. 794 of 1863.

Special Appeal from a decision passed by Mr. E. F. Latour, Judge of Patna, dated the 16th December 1862, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 15th April 1862.

Baboo Luchmun Pershad (Plaintiff) *Appellant,*

versus

Juggurnath Doss and others (Defendants) *Respondents.*

Baboos Mohesh Chunder Chowdry and *Tarucknath Sein* for Appellant.

Mr. C. Gregory for Respondents.

In a suit by a Minor after attaining majority, no allowance can be made, under Regulation III 1793, for the period of pendency of a suit brought by his guardian and eventually non-suited.

Campbell, J.—APPELLANT'S case has been thrown out on the ground of limitation, 12 years having elapsed since he attained majority. He claims allowance for the period of pendency of a suit brought by his guardian, and eventually non-suited. But we think that this does not come within the terms of Regulation III of 1793, that appellant did not directly bring any suit for 12 years after he was competent to do so, and we, therefore, dismiss the appeal with costs.

The 5th January 1864.

Present:

The Hon'ble C. Steer and L. S. Jackson, *Judges.*

Sale of Rebel's property—Limitation.

Case No. 2866 of 1862.

Special Appeal from a decision passed by Baboo Tarakant Bidyasagur, Principal Sudder Ameen of Behar, dated the 30th August 1862, reversing a decision passed by Moulvie Mahomed Abdool Luteef, Moonsiff of Gya, dated the 28th June 1861.

Prosunno Pandey and others (Plaintiffs) *Appellants,*

versus

Gunga Ram (Defendant) *Respondent.*

Baboo Greesh Chunder Ghose for Appellants.

Mr. C. Gregory for Respondent.

Where the property of a rebel has been sold, any party claiming an interest in the thing sold is bound, under Section 20 Act IX of 1859, to bring his suit within one year from the date of the order of confiscation.

Steer, J.—THE Principal Sudder Ameen has found, as points of fact, that the house, the subject of this suit, was the exclusive property of the rebel Durshun Pandey; that it was seized, confiscated, and sold by Government; and that the present suit, which claims a part of the house, not having been brought within one year from the date of the confiscation, is barred under Section 20 Act IX of 1859.

It is contended that the Section above quoted is inapplicable, as the present suit is not to reverse the sale of Durshun's rights and interests, but to establish the right of the plaintiff to a share in the house.

We hold that the ground urged is unsound. The fact which the Court has found that the house was exclusively the property of Durshun is conclusive, and there is no doubt that where, as in the present case of a sale of property belonging to a rebel, the thing itself is sold, any party who claims to have any interest in the thing sold, is bound to bring his suit within one year from the order of confiscation. We dismiss the special appeal with costs.

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The 7th January 1864.

Present:

The Hon'ble G. Campbell, *Judge.*

Principal and Agent—Purchase by Agent.

Case No. 598 of 1863.

Application for review of Judgment passed by the Hon'ble Justices Kemp and Campbell, on the 4th August 1863, *in Special Appeal No.* 576 *of* 1863.

Ishen Chunder Singh, *Petitioner,*

versus

Shama Churn and others, *Opposite party.*

Mr. R. V. Doyne and *Baboo Mohendro Lal Shome* for Petitioner.

If a principal adopts the acts of an agent in respect of the purchase of a property, he must take the property subject to the conditions with which the agent encumbered it, notwithstanding any secret arrangement between them not known to third parties.

MR. DOYNE seeks a review on the ground that, there being no finding in regard to Ishen Chunder's participation in the dealings with plaintiff, nor as to his having been the real purchaser who found the money, he must be taken for the law of our judgment to be an innocent principal whose agent, Koylas, dealt with plaintiff without authority, and that, there being no privity of contract between plaintiff and Ishen Chunder, a decree cannot pass against the latter.

The position is certainly a peculiar one, and I took time to consider whether the review should be admitted for argument. But, on the whole, I am clear that, on broad grounds of equity, the decision must be upheld, and that I should not be justified in allowing the time of the Court to be occupied by a lengthened discussion on many points of Law hitherto not definitely established in our Courts. The principal may adopt the agent's acts if he chooses, or may reject them if he chooses; but, if he does adopt them, he must take the property subject to the conditions with which the agent encumbered it. He cannot, by putting forward the secret arrangement between himself and his agent not known to third parties, obtain the property under more advantageous circumstances than those under which the agent acting in his own name as a principal had bought it. I reject the application for review.

The 8th January 1864.

Present:

The Hon'ble C. Steer and L. S. Jackson, *Judges.*

Maintenance—Waivor—Objection by Respondent (under Section 348 Act VIII of 1859).

Case No. 170 of 1863.

Regular Appeal from a decision passed by Baboo Punchanun Banerjee, Principal Sudder Ameen of Hooghly, dated the 16th December 1862.

Ram Lal Mookerjee (Defendant) *Appellant,*

versus

Mussamut Tara Soonduree Debia (Plaintiff) and others (Defendants) *Respondents.*

Baboos Onookool Chunder Mookerjee and *Dwarkanath Mitter* for Appellant.

Mr. R. T. Allan, and *Baboos Prosunno Coomar Sein, Otool Chunder Mookerjee,* and *Doorga Doss Dutt* for Respondents.

Appeal valued at rupees 4,300.

A right to maintenance bequeathed to a person is not affected by any private arrangement entered into by the members of the testator's family who are equally liable to pay the maintenance as a charge on the testator's estate.

The Plaintiff, however, having chosen to reside in and be supported by the family, and having made no claim for maintenance for 12 years after the testator's death, was presumed to have waived her right to maintenance.

A Plaintiff (respondent) may take an objection under Section 348 Act VIII of 1859 against defendants who have not appealed but who are *pro formâ* brought in as co-respondents.

Jackson, J.—THIS appeal of the defendant appears to us entirely groundless.

The maintenance bequeathed to the plaintiff by the testator was to be a charge on the estate, and the three brothers were all equally liable to pay the plaintiff whose rights are not affected by any private arrangement entered into by them.

As to the objection urged by the respondent, a question was raised as to her competency to prefer it as against the defendants who had not appealed, and who were *pro formâ* brought in as co-respondents. We think that, as the objection equally affected the appellant, and as these parties were

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present in the appeal, the objection can be heard.

The respondent's contention is, that she was entitled under the terms of the will to maintenance from the testator's death, and that the Principal Sudder Ameen, in holding otherwise, has wrongly construed the will.

We have no doubt that, if the plaintiff had chosen to live separately from the time of the testator's death, she could have claimed the allowance; but seeing that it was given to her for subsistence and the performance of fitting ceremonies, we think it may be fairly inferred from the fact of her having resided in the family, being fed and supported and taking part in the family worship, and from her not having made any claim for maintenance for fully 12 years, that she accepted such residence and support instead of the specific allowance given by the will.

We, therefore, affirm the judgment of the Court below. Each party will pay his own costs, and the appellant will pay the costs of the co-respondents.

The 9th January 1864.

Present:

The Hon'ble C. Steer and L. S. Jackson, *Judges.*

Sale of Putnee—Irregularity.

Case No. 174 of 1863.

Regular Appeal from a decision passed by Mr. O. W. Malet, Judge of Beerbhoom, dated the 9th February 1863.

Becharam Mookerjee (one of the defendants) *Apellant,*

versus

Issur Chunder Mookerjee and others (Plaintiffs) and Pran Kishen Banerjee (Defendant) *Respondents.*

Mr. J. Cochrane and *Baboo Dwarkanath Mitter* for Appellant.

Mr. R. T. Allan and *Baboos Kishen Kishore Ghose* and *Banee Madhub Banerjee* for Respondents.

Suit laid at rupees 7,500.

According to Regulation VIII 1819, the sale of a Putnee tenure for arrears of rent must take place on a day in the Bengalee month of Jeyt.

Where a sale was advertized to take place on the 5th Jeyt 1269 which date was erroneously stated in the sale notice to correspond with Saturday the 17th May 1862, whereas the 5th Jeyt was, in fact, Sunday the 18th May, and the sale took place on Saturday the 17th May, corresponding with the 4th Jeyt, the sale was held to be illegal in consequence of its not having taken place on the 5th Jeyt or any subsequent day to which the sale might have been adjourned after due notice.

Steer, J.—This is a suit to set aside a sale of a Putnee Talook on the ground of there having been no arrears and of error and irregularity in the sale.

The Judge has found, besides other minor irregularities, that the sale which was advertised to take place on the 5th Jeyt 1269, which was Sunday, actually took place on the 4th Jeyt, for which and for other reasons he sets aside the sale.

It appears from the published notice of the sale, that the sale was advertised to take place on the 5th Jeyt 1269. By an error said to have been occasioned by an incorrect Almanac, the 5th Jeyt was stated in the sale notice to correspond with Saturday the 17th May 1862, but the 5th Jeyt was, in fact, Sunday the 18th May 1862. Now, though the sale took place on Saturday the 17th May 1862, it did not take place, as advertised to do, on the 5th Jeyt, and the question we have to determine is, whether, in consequence of its not having taken place on the 5th Jeyt, or any subsequent day to which after due notice it might have been put off, the sale is illegal.

Regulation VIII of 1819 speaks of the Bengalee month, and prescribes that the sale shall be held on a day in the month of Jeyt. The date of sale requires to be a Bengalee date, a day in Jeyt; an English date need not be given at all; and, if it is given, it is not given as intimating that the sale will be made on that date, but merely to supply an English date corresponding with the fixed date in Bengalee. When, therefore, the Collector discovered, and he should most certainly have discovered it, that the 5th Jeyt was not the 17th May, and that the 5th Jeyt fell on a Sunday, he should have selected the next following open day, *viz.*, Monday the 6th Jeyt, corresponding with the 19th May for holding the sale. Instead of doing this, he proceeded to sell the Putnee Talook on the 17th May, or on the 4th Jeyt, that is, a day previous to the fixed day.

Every sale requires, as conditions precedent to it, to be made at the place where the advertisement says it shall be held, and on the day advertised, or on any subsequent

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day to which the sale may be adjourned after due notice. To hold a sale on the 4th Jeyt which is advertised to be held on the 5th Jeyt, without any prior notice of change of date is, in fact, to sell without notice, and is no sale at all; and where there has been such an illegality in the sale before us, it is impossible that it can be allowed to stand.

We agree, therefore, with the Lower Court that the sale must be set aside; and as to the objection raised by the zemindar, defendant, as to the costs of suit having been entirely thrown on him, we have to observe that, as he was responsible for seeing that every thing relating to the sale is regular, and as it was in his power to stop the Collector from selling the Putnee on a date when it could not be legally sold, he has certainly, by his own neglect, brought this action upon himself, and is rightly chargeable with the costs of it. The appeal before us is dismissed with costs.

The 13th January 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Rebel's property (Claim to a tenure in)—Limitation.

Case No. 1043 of 1863.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 28th February 1863, affirming a decision passed by Moulvie, Eradut Ali Khan, Principal Sudder Ameen of that District, dated the 13th September 1862.

Baboo Nepal Singh (Plaintiff) *Appellant,*

versus

Ram Surun Singh and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboos Juggodanund Mookerjee, Kishen Succa Mookerjee,* and *Ram Chunder Banerjee* for Appellant.

Baboos Dwarkanath Mitter and *Mohesh Chunder Chowdry* for Respondents.

A Mokurruredar, having fled and abandoned his tenure appertaining to a rebel's estate which was confiscated by Government, was held not entitled to recover the tenure on the ground (1) that his suit was barred by Section 20 Act IX of 1859 and (2) that the Mokurruree was not an absolute tenure, but one on condition of service to be rendered to the former proprietor whose estate had been confiscated for rebellion.

Campbell, J.—APPELLANT urges that he did not resign his right to the property, and that he was willing to render the service attached to his tenure.

Respondent takes the counter objection that the suit is barred by Section 20 Act IX of 1859.

We think it clear that the Mokurureedar having fled and abandoned the tenure carved out of Koer Singh's property, the land in dispute was, as matter of fact, taken into the absolute and direct possession of Government, under color of the confiscation of Koer Singh's property, and assigned to the defendants. That being so, we think that the claim should have been brought under Act IX of 1859, and that it cannot now be heard.

We also think that the Mokurruree, not being an absolute tenure, but one on condition of service to be rendered to the former proprietor whose estate has been confiscated for rebellion, cannot now be recovered.

We dismiss the appeal with costs.

After this decision was passed and given in, Mr. Montriou applied to be heard on the ground that, although the case had been argued by the pleaders of the Court, he having been retained and not having been heard, should now be heard. We cannot re-open the case.

The 15th January 1864.

Present:

The Hon'ble H. T. Raikes and W. S. Seton-Karr, *Judges.*

Evidence (Copy of deed of purchase) —Limitation (Regulation II 1805).

Case No. 113 of 1863.

Regular Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 3rd December 1863.

Anundo Moyee Dossee and others (Plaintiffs) *Appellants,*

versus

Mr. J. Mackenzie and others (Defendants) *Respondents.*

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Mr. R. V. Doyne and *Baboo Kishen Kishore Ghose* for Appellants.

Mr. G. C. Paul and *Baboo Khettur Mohun Gangooly* for Respondents.

Suit laid at rupees 52,708.

A copy of a deed of purchase was refused in evidence, the plaintiffs, who had taken nearly 10 years to sue for the property, being unable to produce the original deed or even the copy which they produced at the first hearing of the case.

Peaceable possession by *A* for 15 years before the date of suit was held to be a bar, under Regulation II 1805, to any enquiry into the title of the defendants who held by purchase from *A*.

Seton-Karr, J.—THE main facts out of which this case arises, are not the subject of dispute.

Sreenath Mullick mortgaged the land claimed by the plaintiffs, with other properties, to the predecessor of the plaintiffs, the late Motee Lal Seal. This was on the 14th of October 1841. Sreenath himself died on the 12th of September 1845. The mortgage money becoming due, Motee Lal filed a bill in equity in the late Supreme Court in February 1846, and an order being given to the Master to take an account of the debt, this officer reported on the 7th September 1852 that a large sum was due under the mortgage. Six months were then allowed to the mortgagor to clear off his debt and redeem the property; but on the 22nd of November 1852, Motee Lal Seal, instead of foreclosing the mortgage, put up the mortgaged property for sale, as an asset of his debtor, with the permission of the Court, and bought the same. On the 3rd of January 1854, Motee Lal, who said he was obstructed in taking possession, sued on a writ of assistance, and was put into possession of a portion of his purchase by the Sheriff's officer. On the 24th of May, Motee Lal Seal died.

Intermediately, however, the property in dispute had been put up to auction by the Sheriff on the 13th of January 1846, by one Saadut Ali, another creditor of Sreenath, and purchased by him. Saadut in his turn conveyed the same privately to Meheroonissa on the 27th of January 1847.

In this state of things, the plaintiffs, who represent Motee Lal, claim the property in dispute, which consists of 9-6 beegahs, situated in Howrah, and very valuable, on the ground of the bill of sale obtained by them in the Master's office.

Mr. Mackenzie, a defendant, claims to retain 4 beegahs of the land on the ground that he obtained 1½ beegahs of the same by purchase from Mr. Lancaster, the Executor of Mrs. Denty, who obtained the same from Mrs. Floyd, who obtained them from Prem Chand Bose under a perpetual lease. The remaining 2½ beegahs he obtained from Meheroonissa. Meheroonissa supports this defence. Another defendant, Mrs. Rogers, also claims to hold her portion of the lands from Meheroonissa, and under the purchase from Saadut Ali.

The Principal Sudder Ameen, in not a very intelligible judgment, appears to us to hold that the plaintiffs bought nothing, though they had rights as mortgagees, and that they have made out no claim to disturb the parties in possession who hold under the intermediate purchase of the common debtor's rights by Saadut Ali at the Sheriff's sale in January 1846.

The questions of Law arising out of this state of things have been very fully and ably argued before us by Mr. Doyne for the appellants, and by Mr. Paul for the respondents, and we now proceed to dispose of the same.

It is quite clear that the plaintiffs' action is based on the bill of sale in the Master's office, inasmuch as they preferred to purchase their debtor's rights and interests to a foreclosure on their own rights as mortgagees; and the first point we have to decide is, whether this bill of sale can be admitted as evidence. The Lower Court refused to receive the document, which is dated the 18th of February 1853, on the ground that it was not filed within the time allowed by the Court, and because the original was not proved according to the requirements of Section 11 Regulation XXXVI of 1793. Now it cannot be contended that, under Sections 39 and 128 of the Code of Civil Procedure, a plaintiff is not bound to produce his written document on which he relies in support of his claim with the plaint, as well as to produce all documentary evidence which may not have been already filed at the first hearing of the suit. On these points, the Law is clear. But the plaintiffs never conformed to either of these requirements.

When the defendants objected by petition in the Lower Court that the plaintiffs had not filed the original bill of sale from the Master's office, an order was passed for the plaintiffs to file the same before the day fixed for the issues in the case. The plaintiffs then professed to be able to produce the deed from a record in a case in the Midna-

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pore Court in which it had been filed, but it turned out that that deed related to other and distinct property, and it is admitted in the evidence of one Ram Chunder that he made a search for the original deed, in the company of Heera Lal, the son and heir of Motee Lal Seal, but was unable to discover anything regarding it.

The deed now tendered is a copy obtained from the Office of Registrar of Deeds at Howrah, and it is not even pretended that the original deed was drafted with the approval of the Master in Equity, whose interference is only invoked where the parties in the suit are unable to agree as to the terms. It is clear then, from this, that the plaintiffs, who have taken a period of nearly ten years to sue for this property, not only could not produce the original deed of purchase, but knew so little of the matter as to imagine that the deed would be found filed in another case at Midnapore, and that they were unable to produce even the copy which they did produce at the first hearing of the Court. We are not inclined to relax the provisions of a strict and salutary law in favor of persons in the position of the plaintiffs who may be supposed fully capable of looking after their own interests, and we cannot admit that the absence of the necessary original deed, on which the whole claim is based, is compensated by the production of the writ of assistance, which was granted on a mere statement of the plaintiffs, to the effect that that they had met with obstructions in taking possession. Neither is the evidence of Mr. Anley, which is good as far as it goes, sufficient to satisfy us of the nature of the deed, or to make us admit the copy as a copy of the deed which he himself witnessed.

We may observe here that the Lower Court appears to have allowed the deed to be put with the record, on the 5th of November 1862, and then in the decision to have refused to receive the same as legal evidence.

For the reasons given above, we refuse to admit the copy in question. No original deed is traced or traceable. The plaintiffs claiming to produce the original deed from another Court, were obliged to admit that they laboured under a misapprehension of facts within their own knowledge as to the character of the deed ; and the copy now tendered was never tendered, as it ought to have been, at the first hearing of the case.

A considerable deal of argument has been used by the Counsel for the respondents to nduce us to believe that the identity of the lands claimed by the plaintiffs with those held by the defendants, has not been satisfactorily proved. This objection, however, is raised at a very late stage of the proceedings. It does not appear to have been seriously argued in the Lower Court, though one issue was drawn up on this point. The lands in dispute are obviously part of Lot No. 7, and from the evidence of Mr. Baxter, the Sheriff's officer, from that of Mr. Floyd, from that of the native witnesses, as well as from a map and report of an Ameen deputed to the spot by the Lower Court, we are fully satisfied that the lands claimed by both parties are those sold at one time to Saadut Ali by the Sheriff, and at another to the plaintiffs by a sale held in consequence of proceedings held in the Master's office. When the Ameen went to the spot, the only boundary stated to be in dispute was the northern boundary, and not the eastern boundary, the latter being only one which, if disputed, could raise a doubt as to the identity of the lands. When the Ameen went to the spot, he found that the northern boundary was in the deed of mortgage described as the premises of one Busseeroodeen, and in the Sheriff's sale as the public road, and he seems to have held that the land described as that of Busseerooddeen had been absorbed for the public wants. Some question did arise as to the position of some lands to the east known as Kadamaree, but the Ameen was satisfied that the lands were identical, and that the eastern boundary was now known as Bengal Baboo's land.

On the whole, considering that there has never been any dispute about three of the boundaries, that the discrepancy as to the fourth boundary was soon cleared up, that the lands, for all practical purposes, were treated as identical in and by the Lower Court, and that no argument was advanced on this head until this appeal, we admit the arguments of Mr. Doyne, and decide this point against the respondents.

The point that now remains for adjudication is that of limitation in favor of the respondents, against this heirs of Motee Lal Seal. We may observe that the point was argued before us last in order, as the case proceeded, having been then raised by the respondents. For the plaintiffs, it is contended earnestly that their cause of action only arose in 1852, and that from this date they are admittedly in time : that their rights, position, and interests in the property were not so identical with those of Sreenath as to render it incumbent on them to sue within

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the period in which Sreenath would have been bound to sue : that in 1846, when the Sheriff's sale to Saadut Ali took place, the plaintiffs had only the dry legal title, could only then have sued as pledgees of the land, and would at once have ceased to have any interest therein had the debt been paid off, as it might have been at any time : that Sreenath had possession and might and ought to have sued within 12 years from January 1846, whereas the plaintiffs had no possession and no right of taking possession except by order of Court : that the plaintiff's estate was not burdened with Sreenath's liabilities, and that they are not privy to him in estate : and that, to sum up matters, the cause of action did not arise to the plaintiffs until November 1852, and if it be held that the cause did so arise, the plaintiffs had good and sufficient reason for not suing until 12 years from that date, as it was previously quite uncertain whether the debt, which constituted the plaintiffs' lien on the land, would be paid off.

In support of this doctrine, reference was made by the learned Counsel to Moore's Privy Council Reports in the case of Troup *versus* the East India Company.*

On the other hand, it was contended that the plaintiffs' cause of action was not the mortgage, and that the writ of assistance to the Sheriff's officer did not bind other parties : that if, as had been put forward by the appellant, the Sheriff's sale, conveyed nothing inasmuch as rights of the kind, if put up for sale, were not legally saleable by English Law until the passing of Act VI of 1855, then Saadut Ali and his representatives took possession as mere trespassers, and without any legal title, as they had bought nothing : that it was the more incumbent on all parties to sue within 12 years, and that the *defacto* possession of the defendants was notice to all the world that the plaintiffs, if they did not foreclose, or as possessors of all Sreenath's rights, if they did not sue in six months to redeem the mortgaged property, were bound to have brought an action of ejectment within 12 years ; and that if the doctrine contended for by Mr. Doyne be sound, then the plaintiffs, had they purchased, not in 1852, which would be six years after the possession of Saadut Ali, but 20, 30, or 40 years afterwards, would still have had their right of action of recovery, and that this doctrine would be simply intolerable.

* See 4 Weekly Reporter, Privy Council Cases, p. 111.

After giving our careful attention to this part of the case, we admit the validity of the arguments advanced by Mr. Paul.

The parallel quoted of reversioners to the estates of Hindoo widows, who are not obliged to sue until the death of the widow, is not a a fair parallel. The possession of Saadut, obtained neither by use of force, nor by ingenuity of fraud, renders it necessary for us first to enquire whether the plaintiffs can be permitted to raise any enquiry into the title of the defendants, or whether the plaintiffs have any right to seek to disturb the same, except as suing under Regulation II of 1805, or under the well known Law of Limitation. Now it is admitted that the peaceable possession of Saadut commenced in 1846, or 15 years before the date of this suit, and, this being the case, such possession bars any enquiry into the defendants' title in this case. The limitation as between mortgagor and mortgagee does not apply, looking to the precise form and terms of the plaint. Limitation was running against all parties from 1846, and when the plaintiffs obtained a complete title in 1852, they were still bound to have sued within 12 years from the date of the first adverse possession.

In this view, after a very full consideration, we dismiss the plaintiff's appeal with all costs.

The 16th January 1864.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Lakheraj land (Resumption and assessment of)—Onus probandi.

Cases Nos. 191 and 192 of 1863.

Regular Appeals from decisions passed by the Principal Sudder Ameen of Tipperah, dated the 23rd December 1863.

Beer Chunder Joobraj Thakoor (Plaintiff) *Appellant,*

versus

Shibjoy Thakoor and another (Defendants) *Respondents.*

Mr. H. Stainforth and *Baboo Onookool Chunder Mookerjee* for Appellant.

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Mr. R. T. Allan and *Baboo Chunder Madhub Ghose* for Respondents.

Suit laid at rupees 6,689-8-0-9-12.

In a suit to resume and assess lands under 100 beegahs held as rent-free on an invalid title, if the defendant files his sunnud showing the area to be above 100 beegahs, it is for the plaintiff who alleges that *primâ facie* good title of the defendant to be bad, to prove it to be so.

Bayley, J.—THESE are two appeals from the decision of the Principal Sudder Ameen of Tipperah. In the one, No. 191, the Rajah of Tipperah, the plaintiff in the case, is appellant, and one Shibjoy Thakoor is defendant. In the other, the same party, (the Rajah) is plaintiff, appellant, and Omakant Sen is defendant, respondent. But it will not be necessary to give any decision on the merits of this case, as the defendant is shewn on the record to have deceased, and the appellant has taken no steps to bring his representative into Court; nor has the party, who is on the record as petitioning to be the representative of Omakant Sen, produced any certificate of succession or other legal proof of his alleged title.

In No. 191, the plaintiff sued to resume and assess certain lands, being stated by him to be 8 droons and a fraction, under Section 30 Regulation II of 1819, *i. e.*, as zemindar of the Mâl estate in which they are situated, and on account of the said land being held by defendant rent-free under an invalid title.

Defendant's case is that he holds 7½ droons as rent-free under a valid title, *viz.*, a sunnud of the then Rajah of Tipperah of the 15th Kartick 1196 F. S.; that 7½ droons being an area exceeding 100 beegahs, the plaintiff has, under Section 6 Regulation XIX of 1793, and Section 30 Regulation II of 1819, no legal right to assess or resume the lands; that, even if he had ordinarily such legal title, he has himself by contract divested himself of it, the Rajah of Tipperah, having on the 10th Srabun 1236 F. S., agreed not to create or resume *any* lakheraj lands; and the plaintiff himself, having on the 8th Jeyt 1262, F. S., entered into a distinct engagement that he would not resume any lakheraj land which the regulations or orders of Government prohibited his doing; that the orders of Government of the 16th September 1844, read with the 6th and 9th paras. of the Commissioner's letter of the 2nd August 1844, clearly precluded the Rajah from exercising the rights of resumption, and relieved the Rajah himself from the effect of any resumption operations being carried on in his estate on the Rajah paying to Government, as revenue, a sum of rupees 8,000 per annum in addition to his previous rent-roll jumma. The defendant adds that the Special Commissioner has held, in his decision dated 11th July 1844, that the Rajah of Tipperah had a special settlement in 1236 which was *exclusive* of the lakheraj assets, and thus prevented him from interfering to create or resume lakheraj lands.

The Principal Sudder Ameen upon these proceedings fixed the following issues in Appeal No. 191, *viz.* : 1*st*, whether limitation barred the suit; 2*nd*, whether the area sought to be resumed exceed 100 beegahs or not; 3*rd*, whether the lands in suit were valid lakheraj or not; and decided that the plaintiff's claim was against the terms of the agreement of 1236 by his ancestor, and against the 9th para. of the Commissioner's letter confirmed by Government, and the construction put upon them by the special Commissioner. The Principal Sudder Ameen also cited in support of his view Nil Monee Singh's case, dated 8th June 1857, S. D. A. Rep. 1857, Volume I, page 997. He further recorded that, as plaintiff had not received any order of Government to resume lakheraj lands, he could not do so; that the plaintiff could "inherit only the right, property, title, and ownership which the predecessors had;" and that thus "it becomes evident that plaintiff has no power to resume lakheraj lands existing from before the grant of the said ekrar by his ancestor in 1236, and when the disputed land is proved to be existing from before the execution of the said ekrar, it was not necessary to try the point whether the land in question was being enjoyed and held in possession as lakheraj from before the 1st December 1790, or whether the suit was barred by the Law of Limitation." The Principal Sudder Ameen then held that it was not legal under the precedent of A. J. Forbes's case, 26th May 1860, S. D. A. Rep., page 592, and Section 3 Regulation I of 1793, "to consider the authenticity or otherwise of the sunnud without making Government a party to the suit." The Principal Sudder Ameen on these grounds dismissed plaintiff's suit.

Plaintiff appeals, urging—

I. That the agreement of his ancestor of the 10th Srabun 1236 F. S. does *not* bind him, and that he can only be bound by his own agreement of the 8th Jeyt 1262, which

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specifies that in regard to the resumption of lakheraj land, he will not go beyond the law and the orders of Government; that when he is within the law, *i. e.* Section 6 Regulation XIX of 1793, and Section 30 Regulation II of 1819, he is competent to exercise the power to resume and assess given by that law; and that by the law he can at any time resume invalid lakheraj, even exceeding 100 beegahs, if held rent-free when really Mâl, *i. e.* under Section 10 Regulation XIX of 1793.

II. That the agreement of 1262 is one waiving, on the part of Government, its claim to any resumption in consideration of an excess jumma of 8,000 rupees, then added to the Rajah's rent-roll jumma, and that thus the Government right of resumption passed to the Rajah.

III. That the orders of Government of the 16th September 1844 did not prohibit the Rajah from resuming lands.

IV. That there has been no consideration or decision as stated in express terms by the Principal Sudder Ameen at the close of his judgment of the authenticity or validity of the defendants' alleged lakheraj sunnud, or whether the land is rent-free, created before or after 1st December 1790, *i. e.* whether it is not Mâl land, and, therefore, under Section 10 Regulation XIX of 1793, resumable at any time and of whatever area.

Judgment.

The first point to be considered in this case is, whether the land was lakheraj at the Decennial Settlement, *i. e.* existing as lakheraj on or before the 1st December 1790, because if it could not be shown to be such land, the zemindar might at any time resume and assess it as Mâl under Section 10 Regulation XIX of 1793. The plaintiff, the Rajah, does not, however, claim it under that law, but under Section 6 Regulation XIX of 1793, as lakheraj under 100 beegahs, and sues accordingly under Section 30 Regulation II of 1819. This procedure is specifically quoted in his plaint.

Moreover, the defendant's sunnud of 1196, until shown by the plaintiff to be unauthentic or otherwise, is *primâ facie* evidence of the land not being the Mâl land contemplated by Section 10 Regulation XIX of 1793, and plaintiff has in no way attempted to prove that sunnud to be no sunnud of lakheraj land at all. It is true that the Principal Sudder Ameen did not decide this point; but the third issue clearly raised it, and the defendant having filed his sunnud as of 1196 F. S., it was for the plaintiff who alleged that *primâ facie* good title to be invalid and bad, to prove it to be so. This, as before observed, he did not attempt. The land cannot, therefore, be held by us to be the Mâl land contemplated to be resumed under Section 10 Regulation XIX of 1793.

In the same view we find that the sunnud in this case is for an area of 7½ droons, that is, as admitted by both parties, for an area of more than 100 beegahs. The land then, as we have above held, not being shown by plaintiff in this case to be that Mâl land contemplated by Section 10 Regulation XIX of 1793, it was for plaintiff to show that the *primâ facie* proof, which the defendant's sunnud afforded of the area being above 100 beegahs, was capable of being rebutted. But this he in no way attempted, although the second issue clearly required plaintiff to do this.

Under this state of the case we do not see that plaintiff's suit to resume and assess this land under Section 6 Regulation XIX of 1793, which contemplates the resumption and assessment by zemindars (in proceeding under Section 30 Regulation II of 1819) of areas under 100 beegahs held as rent-free on an invalid title can be otherwise than dismissed. And we accordingly dismiss his suit and his appeal with costs.

The 19th January 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Joint Hindoo Family—Onus probandi—Separate possession.

Case No. 247 of 1863.

Regular Appeal from a decision passed by the Judge of Midnapore, dated the 4th February 1863.

Joynarain Roy and others (Plaintiffs) *Appellants,*

versus

Rajah Punchanund and others (Defendants) *Respondents.*

Baboo Juggodanund Mookerjee for Appellants.

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Mr. R. T. Allan and *Baboo Kishen Kishore Ghose* for Respondents.

Suit laid at rupees 1,184-3.

Where the ancestor of a joint Hindoo family purchased a property in the name of his youngest son, the *onus* was held to be on those claiming under the youngest son to prove that the property was his separate possession.

Kemp, J.—THIS was a suit to obtain possession of an estate by name Poroonda, and was laid at rupees 1,184-3.

The plaintiff avers that this talook was purchased in the name of his maternal grandfather, Anundee Ram, during the life-time of the common ancestor of both parties, Rajah Gunga Ram, whose eldest son is the defendant, Rajah Punchanund. The plaintiff further alleges that his maternal grandfather, Anundee Ram, was in separate possession of the talook from the date of its acquisition to date of his death ; that plaintiff being a minor up to 1269, he was prevented from bringing this suit at an earlier period ; and that even now he has been obliged to part with one-half of the property in litigation to the co-plaintiff to enable him to raise funds to carry on this suit.

The defendant, Rajah Punchanund, stated that the talook was purchased by his father, Rajah Gunga Ram, with his own funds in the name of his younger son, Anundee Ram; that Rajah Gunga Ram was in possession from date of purchase which took place in 1217 to date of his death in 1228; that from that year the defendant is in possession ; and that the plaintiff's suit is barred.

The Judge of Midnapore held that the suit was not beyond time. He observes that plaintiff's mother was a minor when Anundee Ram died ; that plaintiff also was under a legal disability to sue up to 1269 ; that eight years of the prescribed period of 12 years had run out in the time of plaintiff's mother, and one year and ten months within the plaintiff's time; and that, adding the two periods together, the suit was not beyond time.

On the merits he threw the *onus* on the plaintiff, and dismissed the plaintiff's claim, holding that the property was purchased with the funds of Rajah Gunga Ram, in the name only of Anundee Ram, who never was in possession.

Both parties appeal.

It will be necessary to consider, first, the plea of limitation which the defendant has taken orally at the time of hearing this appeal under Section 348 of the Code of Procedure.

We are of opinion that the suit of the plaintiff is clearly barred under the Statute of Limitations.

The property in dispute was acquired in two moieties in 1217 and 1218, half a century ago. Gunga Ram, the common ancestor of both parties, died in 1228, forty-two years ago. Anundee Ram died in 1235, and, at his death, had been a major for seven years. The pleader for the plaintiff, appellant, declared that he was prepared to prove the separate possession by Anundee Ram of the talook in dispute, although he admits that, in other respects, the family was joint. The *onus* is, therefore, clearly upon the plaintiff, and he has wholly failed to show separate possession at any time by Anundee Ram. The fact is that the property, as is often the case in Hindoo families, was purchased by the father Gunga Ram in the name only of his youngest son, Anundee Ram.

As, therefore, plaintiff fails to show separate possession by Anundee Ram, from whom he alleges he derives title, and as seven years of adverse possession by the defendant after Anundee Ram's majority, and eight years after plaintiff's mother arrived at majority had run out, the suit of plaintiff is clearly barred.

The appeal of the plaintiff is dismissed with costs and interest, and that of the defendant decreed with costs and interest.

The 19th January 1864.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Estoppel—Misrepresentation.

Case No. 189 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 20th December 1862.

Baboo Radhakishen (Plaintiff) *Appellant,*

versus

Mussamut Shureefunnissa and another (Defendants) *Respondents.*

Baboo Unnoda Persad Banerjee and *Moulvie Murhumut Hossein* for Appellant.

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Mr. C. Gregory and *Moonshee Ameer Ali* for Respondents.

Suit laid at Rs. 11,742-11-5.

Parties who, by false representations, induce others to enter into contracts, are estopped from afterwards falsifying their statements, and, if necessary, may be compelled to make them good.

Jackson, J.—The plaintiff, Radhakishen, preferred this suit for a declaration of his right to bring to sale certain landed estate in execution of a money-decree against Mussamut Shureefunnissa. Plaintiff stated that he had lent money on bonds to Mussamut Ameerunnissa, mother of Rukanuddeen defendant; that, on the death of his mother, Rukanuddeen had, on the 29th November 1855, executed a deed of sale of the landed estate inherited from his mother in favor of the defendant Shureefunnissa; that the deed recited the debt to plaintiff from Ameerunnissa, and assigned the liability for that debt to Shureefunnissa who, at the same time, executed an ikrarnamah acknowledging her liability, and pledging the estate purchased from Rukanuddeen as security for the payment of the debt. Plaintiff subsequently sued Shureefunnissa, and obtained a decree for the amount of the debt due to him on Ameerunnissa's bond and the ikrarnamah. In execution of that decree, he attempted to sell the landed estate pledged in the ikrarnamah, but was opposed by Rukanuddeen, who declared the sale to Shureefunnissa to be fictitious. On enquiry, it was found that Rukanuddeen in possession of the property, and his opposition was admitted, and the property released from sale. Plaintiff then sued Rukanuddeen Ahmed for the money due on Ameerunnissa's debt, and for which he had previously sued and obtained a decree against Shureefunnissa. The Sudder Court, however, on appeal, dismissed this suit. The Court's decision was recorded in the following terms:—"If plaintiff was allowed to "maintain this action, and get a decree, "he would hold two decrees against dis- "tinct persons for the same debt. It is not "for us to say in this suit, whether Rukanud- "deen could be permitted to set up his own "title adversely to property which he had "ostensibly conveyed to another person, "and, on the faith of that conveyance misled "the plaintiff to accept the title and lia- "bility of the person to whom such convey- "ance was made; but we may intimate that, "looking at plaintiff's own statement, he ap- "pears to have mistaken his mode of re- "dress." The plaintiff then brought this suit for a declaration of his right to put up to sale the property pledged by Shureefunnissa for payment of his debts, and which had been ostensibly conveyed to Shureefunnissa by Rukanuddeen. Shureefunnissa did not aprear to contest the suit. Rukanuddeen again denied his liability for the debt which he asserted was due from Shureefunnissa, and argued that the plaintiff could not sell his landed estate for Shureefunnissa's debt.

It appears that, in the meanwhile, Shureefunnissa had attempted to sell the landed estate to other parties. The plaintiff, Rhadakishen, on that occasion, as a co-parcener, put forward a claim to pre-emption of that estate, and was met by Rukanuddeen with an allegation that the sale to Shureefunnissa was fictitious, and on trial on that issue it was decided by all the Courts that the sale was a fictitious transaction. Rukanuddeen puts forward this decision as being final on the point between the plaintiff and himself. The Principal Sudder Ameen has again dismissed plaintiff's suit. He refers to the above-mentioned decision in the pre-emption suit, and holds that to be final, as declaring that the sale by Rukanuddeen to Shureefunnissa was fictitious. He holds that plaintiff has accepted Shureefunnissa personally as his debtor, and can only proceed against her estate.

The plaintiff appeals to this Court.

We would express our surprise that the Principal Sudder Ameen should not, in determining this suit, have paid any attention or made any allusion to the remarks recorded by the Sudder Court in their decision above alluded to. It could hardly have escaped the mind of the Principal Sudder Ameen that the interests of justice required that plaintiff should be entitled to bring this property to sale in liquidation of his debt, and that the circumstances of the transaction and litigation between the parties disclosed a case of gross fraud on the part of Rukanuddeen. The Sudder Court had pointed out that Courts of Equity would not permit such fraud to be practised, and that Rukanuddeen, having misled the plaintiff by his own acts, and admissions into a belief that the legal title to the landed estate rested in Shureefunnissa, could not be permitted to deny these acts and admissions to the detriment of plaintiff. Upon this the most important question in the whole case which was before the Principal Sudder Ameen, he is wholly silent, and the consequence is that, if his decision is allowed to stand, a great injustice is committed, and a deliberate

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fraud is allowed to be practised by defendants on plaintiff.

We are of opinion, on the facts of this case, that plaintiff is entitled, in execution of his decree against Shureefunnissa, to sell the landed estate pledged in the ikrarnamah of Shureefunnissa, and conveyed to Shureefunnissa by Rukanuddeen by his bill of sale dated the 8th November 1855, whether such sale was real or pretended. Parties who by false representations induce others to enter into contracts, are estopped from afterwards falsifying their statements, and, if necessary, may be compelled to make them good (Story's Equity Jurisprudence, Section 1538). The defendant, Rukanuddeen, is thus estopped from denying his own acts and admissions under which he misrepresents his own and Shureefunnissa's respective rights to this landed estate, and misled plaintiff into accepting Shureefunnissa as his debtor, as regards the amount of the bonds due from Ameerunnissa. This decision is in no way inconsistent with the former decision in the pre-emption suit.

As regards the plaintiff's rights to pre-emption, the defendant, Rukanuddeen, had made no admission, and he was at liberty to set up what defence he pleased; but as regards the plaintiff's claim on the debt, and his right to sell the landed estate, the subject of this suit, to realise that debt Rukanuddeen had made admissions which he is estopped from denying.

The Principal Sudder Ameen's decision is therefore reversed, and the plaintiff's claim is decreed.

The defendant, Rukanuddeen, will pay the whole costs of this litigation in both the Lower Court and this Court, whether incurred by Shureefunnissa or by the plaintiff, with interest on the whole amount due to each at 12 per cent. per annum to date of payment.

The 21st January 1864.

Present:

The Hon'ble L. S. Jackson and Shumbhoonath Pundit, *Judges.*

Limitation—Maintenance.

Case No. 1370 of 1863.

Special Appeal from a decision passed by Mr. J. C. Dodgson, Judge of Mymensingh, dated the 12th February 1863, reversing a decision passed by Moulvie Mahomed Nazim Khan, Principal Sudder Ameen of that District, dated the 2nd December 1862.

Bamasoondery Debea (Defendant) *Appellant,*

versus

Shamasoondery Debea and others (Plaintiffs) *Respondents.*

Baboo Nil Madhub Sen for Appellant.

Baboos Bhuggobutty Churn Ghose and *Kishen Dyal Roy* for Respondents.

Clause 13 Section 1 Act XIV of 1859 applies to suits for the recovery of maintenance, whether the right to receive maintenance arises out of the general law, or out of a specific deed granting such maintenance.

Jackson, J.—We think that there is no grounds for interfering with the judgment of the Lower Appellate Court.

The first objection taken is that the plaintiff's suit is barred by the Law of Limitation. It is contended that the terms of Clause 13 Section 1 of Act XIV of 1859 do not apply to the present case. That Clause especially provides for the case of suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate. The special appellant's pleader contends that this refers only to cases in which the right to maintenance arises out of the general law, as in the case of widows and the like. We see no ground for drawing any such distinction; and we are clearly of opinion that the Clause would apply in all such cases, whether the right to receive maintenance arises out of the general law, or out of a specific deed granting such maintenance. As, therefore, the plaintiff sued within 12 years, which is the period of limitation prescribed by that Clause, she is manifestly in time.

It is next contended that, inasmuch as the defendant pleaded that the plaintiff had received landed property in lieu of the money allowance, the Judge ought to have recorded a decision upon this point, and that the suit should now be remanded in order that he may do so; but we think that the plea set up by the defendant was not a sufficient answer to the plaintiff's claim, and that, consequently, it was not necessary to frame an issue upon it. The *neum pottro* expressly provided that the plaintiff and her heirs male were to receive from the heirs of the testator a money

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allowance of 50 rupees for her and their maintenance ; but that if the testator or his heirs should make over to the plaintiff landed property yielding a profit of 600 rupees per annum, then her claim to the money allowance should cease. The defendant did not plead that, subsequently to the execution of the *neum pottro*, landed property yielding a profit of 600 rupees per annum had been made over to the plaintiff ; and as it was only on her receiving landed property to that amount that her claim to maintenance was to cease, we think that the plea would not meet the plaintiff's claim.

It is now said that, if the property yielded a profit of less than 600 rupees per annum, the defendant was in that case entitled to have the money allowance reduced to the extent of the profit yielded by the landed property. But we find no provision of that nature in the *neum pottro*. We think, therefore, that the Lower Appellate Court was right in reversing the judgment of the Court below, and giving the plaintiff a decree. The special appeal is, therefore, dismissed with costs.

The 21st January 1864.

Present :

The Hon'ble L. S. Jackson and Shumbhoonath Pundit, *Judges*.

Perpetual lease—Auction-purchaser —Evidence—Receipt of rent.

Case No. 1318 of 1863.

Special Appeal from a decision passed by Moulvie Mahomed Nazim Khan Bahadoor, Principal Sudder Ameen of Mymensing, dated the 9th February 1863, *reversing a decision passed by Baboo Bhowanny Chunder Sen, Moonsiff of that District, dated the 29th May* 1862.

Radhakant Dutt and others (Defendants) *Appellants*,

versus

Hurrokant Sen and others (Plaintiffs) *Respondents*.

Baboos Chunder Madhub Ghose and *Annund Chunder Mitter* for Appellants.

No one for Respondents.

A mokurruree pottah, not being for one of the protected classes of tenures, is not good against an auction-purchaser.

The receipt of rent by a landlord is no confirmation by him of an alleged lease in perpetuity.

Jackson, J.—We think that the decision of the Lower Appellate Court was perfectly right.

The suit was, in substance, a suit to contest the validity of a mokurruree tenure set up by the defendants, although, in consequence of some earlier proceedings under Act IV of 1840, the pleadings were complicated by a needless allegation of possession.

The special appellant complains that, as the Court of first instance fixed no issue touching the validity of the pottah set up by him, he was prejudiced by the Lower Appellate Court having decided that point. But he does not show us that, if the issue had been regularly fixed, he could have made his case any better. The genuineness of his pottah may be assumed, as well as its full efficacy against any one but an auction-purchaser. The only question that remained was, whether it was good against an auction-purchaser. We think it plainly was not, as not being one of the protected classes of tenures.

It has been urged that the auction-purchaser, by receiving several instalments of rent from the defendant at the rate specified in the pottah, has confirmed the lease. But this contention is, we think, idle. A landlord is not bound to refrain from receiving rents until he has had leisure to look into all the under-tenures in his estate; and the receipt of rent is no confirmation of an alleged lease in perpetuity.

We dismiss the special appeal.

The 23rd January 1864.

Present :

The Hon'ble G. Loch and J. P. Norman, *Judges*.

Jurisdiction — False Evidence — Transfer of suits (Section 6 Act VIII of 1859).

Regular Appeals from a decision passed by Mr. A. W. Russell, Officiating Judge of Patna, dated the 3rd August 1863.

Case No. 420 of 1863.

Ranee Asmedh Koonwar (Defendant) *Appellant*,

versus

Mr. W. Tayler, (Plaintiff) *Respondent*.

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

Suit laid at rupees 29,773-8-8.

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Case No. 421 of 1863.

Rance Asmedh Koonwar (Plaintiff) *Appellant,*

versus

Mr. W. Tayler (Defendant) *Respondent.*

Mr. R. E. Twidale and *Baboo Dwarkanath Mitter* for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

Suit laid at rupees 22,600.

Case No. 455 of 1863.

Miscellaneous Appeal from an order passed by Mr. A. W. Russell, Officiating Judge of Patna, dated the 7th September 1863.

Syud Khorshed Ali, *Appellant,*

versus

Mr. W. Tayler and others, *Respondents.*

Baboo Dwarkanath Mitter for Appellant.

Mr. C. Gregory for Respondents.

There is nothing in Section 169 of the Code of Criminal Procedure which gives a Judge, not sitting in appeal, any original jurisdiction to entertain a charge of giving false evidence before another Court.

No other Court than that before which false evidence is given can direct a prosecution in respect thereof.

In a prosecution for false evidence, there must be some specific charge of making some particular and specific false statement, and some direct and distinct evidence that each specific statement is false.

Quære.—Whether a case can be transferred from one Court to another under Section 6 Act VIII of 1859 after the evidence has been taken in the former Court.

Norman, J.—No. 420 of 1863 is a suit by Mr. Tayler, to recover rupees 29,773 for arrears of his salary on a certain hookumnamah, by which, it is said, that he was employed to look after and conduct all the suits of the elder Ranee of Tikaree as her mooktear, at a salary of rupees 500 a month, and certain gratifications for each suit which might be conducted to a successful termination; for interest thereon; and for monies claimed as due on a certain bond.

The defendant, in her answer amongst other things, urged a plea of set-off, *viz.*, that Mr. Tayler had received more monies than were due to him, and brought the cross-suit No. 421 of 1863 to recover monies which she alleged Mr. Tayler had, by fraud and deception, taken from her serishtah, in order that the accounts between herself and Mr. Tayler might be fully investigated.

On the 14th of April 1863, Baboo Tara Kant Bidyasagur, the Principal Sudder Ameen, laid down the issues correctly. Amongst others was an issue whether Mr. Tayler was dismissed by a hookumnamah written on the 18th Maugh 1268 Fuslee, and whether certain work had in fact been done by Mr. Tayler as recited in the bond, or whether the bond had been improperly obtained by him in collusion with one Mirza Dost Mahomed, though this work had not been done.

The witnesses were examined before the Principal Sudder Ameen on the 15th of May, and the 11th of July was fixed for the hearing of the cause; but, on the 7th of that month, Moulvee Abdool Azeez was appointed Principal Sudder Ameen. The latter officer was about to take up the case again on the 1st of August.

On Wednesday, the 29th of July, however, Mr. Tayler addressed a letter to the Judge of Behar, Mr. A. W. Russell, containing charges that Meer Khorshed Ali, the vakeel of the Ranee, had acted towards Mr. Tayler and his "unfortunate" employer, the Ranee, in a way that was grossly dishonest and "discreditable to himself, and ruinous to the secluded old lady of whom he is the sole counsellor on all legal matters; that he has disgraced the profession of which he is a member, and deserves to be dismissed under the provisions of Act XVIII of 1852."

In support of these allegations, the letter gives at great length Mr. Tayler's own version of the dispute between himself and the Ranee, alleging that the Ranee's statements were false; that he should prosecute her for false verification and giving false evidence; that, in such a proceeding, Khorshed Ali would escape; that the abuse of his position was so flagrant that it required a special remedy; that Khorsed Ali had been the Ranee's counsellor throughout, her sole vakeel and legal adviser in the case; and that, under his counsel, direction, and control, statements grossly and scandalously false had been put in with regard to facts of which he had direct personal knowledge; that his influence was paramount with the helpless old lady; that, through his dishonest advice, the Ranee is herself implicated in the crime of perjury; and that, if the law takes its course,

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and justice is done, she will be sentenced to the punishment provided for such a crime, and the whole family disgraced.

He proceeds to submit that Khorshed Ali was guilty of dishonesty in his profession. He states that the case was not yet decided, and suggests that the case should be called up to the Judge's Court. He adds that Khorshed Ali is "in his language and demeanour so coarse, insolent, and overbearing, as to inspire, at times, the timid and respectable natives with positive fear of humiliation and dishonor at his hands. In this very case I understand he spoke in so insolent and ruffianly a manner regarding myself, that he was severely rebuked by the late Principal Sudder Ameen. These exhibitions are of course restrained in the presence of an English functionary." In the postscript he says, "I would beg to observe that, if my deposition on oath is required, I hope it may be taken to-morrow, as I must leave Gya on Saturday."

Upon this letter the Judge records an order dated July 31st, that a petition should be presented upon which "the petitioner's examination under Section 4 Act XVIII of 1852 will be taken at such hour to-day or to-morrow between 12 and 4 P. M. as Mr. Tayler can attend this office."

Mr. Tayler accordingly presented a petition which is as follows:—"That the petitioner charges Meer Khorshed Ali with dishonesty in the exercise of his professional duty, inasmuch as, in a case now pending, he, being the sole legal adviser of the elder Ranee of Tikaree, has placed on record on her behalf and under her verification statements grossly and palpably false in regard to matters with which he is personally and intimately acquainted and knew to be false. Your petitioner, therefore, prays that enquiry may be held in the matter under the provisions of Act XVIII of 1852."

On the same day the Judge took Mr. Tayler's deposition in the presence of Meer Khorshed Ali. In that deposition Mr. Tayler gives the whole history of his own case against the Ranee, and as regards Khorshed Ali does not even confine himself to the charge in his petition, but alleges that, in some case which he does not even name, Khorshed Ali had given two contrary depositions. Mr. Tayler incidentally stated in his deposition that he had written to the Rajah of Benares, a relation of the Ranee, to warn her of her danger from the proceedings he was instituting against her. Khorshed Ali attempted to cross-examine Mr. Tayler, and appears to have put five or six questions to him for that purpose; but Mr. Tayler was permitted by the Judge to evade answering questions which were most material to the defence of Khorshed Ali as follows.

Question not given, but which must have related to the most essential point in the case, *viz.*, whether Mr. Tayler had done the work for which the bond was given him. Answer of Mr. Tayler to Khorshed Ali:—"I cannot, at this moment, recall the cases that were entered in the bond or old letter. When the bond was written admitting that the cases in the old letter were correctly entered, then the old letter was torn up." Question.—"A case was up under Section 25 Act X of 1859, Soonut Koonwar, the younger Ranee and Shaikh Hoormut Ali and another *versus* Kunhya Lal Singh; a suit on the part of the 16-annas zemindar; and a third in which it was sought to obtain an order from the Fouzdaree that the Ranee Asmedh Koonwar might collect all the 16-annas rents. Who was in each?" Answer.—"I cannot tell the cases entered in the hookumnamah, but there was the clear admission in the bond."

In the course of this cross-examination, the Judge allowed Mr. Tayler to insult and brow-beat the accused person, Khorshed Ali, in answer to some questions as to who were the persons alluded to by Mr. Tayler as creatures of the accused about the Ranee. He said, "Dabee Nundun is your known Purwurdah, and is now the Dewan; and I am credibly informed that the Naib Dewan is a relation of yours,—they say a natural son. * * Had I met with any vakeel like you elsewhere, I should have prosecuted him."

The Judge then called for the records and tried the above-mentioned two cases, and ordered the petition to stand over for 20 days.

With respect to the proceeding against the vakeel, we must remark on the extraordinary circumstances under which the charge was made and entertained by the Judge. The charge is not made by the employer of Meer Khorshed Ali. The Ranee is not dissatisfied with her vakeel, whose fault, in Mr. Tayler's eyes was that he was defending her but too well. The Judge having read Mr. Tayler's letter should at once have informed that gentleman that it related to the merits of a case then pending in the Court of the Principal Sudder

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Ameen; that he could not receive private communications on the subject, or interfere with the course of justice in that Court. We do not mean to say that Mr. Tayler might not have made an application under Section 6 Act VIII of 1859 for the transfer of the pending cases to the Judge's Court. But we entertain great doubts whether such an order should have been made under any circumstances that could be supposed after the evidence had actually been taken in the Court below.

The charge in the petition of Mr. Tayler against Khorshed Ali appears to be one of abetment of an offence, or an offence under the 107th, the 210th, or the 193rd Sections of the Penal Code, and should have been dealt with, if at all, as an offence under the Penal Code, and not merely as a charge of professional misconduct.

There is nothing in the 169th Section of the Code of Criminal Procedure which gives a Judge, not sitting in appeal, any original jurisdiction to entertain a charge of giving false evidence before another Court. The Judge, however, chose to treat the case as a charge which he had power to deal with under Act XVIII of 1852. By the 4th Section of that Act, it is provided that, "when any pleader is charged with fraudulent or dishonest conduct in the discharge of his professional duty, the Court is to cause to be served on such pleader a copy of the charge or charges, and such copy and notice of the day appointed by the Court for the hearing of such charge shall be served upon such pleader at least twenty clear days before the day appointed for such hearing." The petition of Mr. Tayler contains no definite or specific charges, and so far from giving him the 20 days allowed by the Legislature to a pleader to prepare his defence, the Judge utterly disregarding the provisions of the enactment under which he professed to proceed, on the same identical day on which the petition was presented, entered upon the enquiry in the presence of Meer Khorshed Ali. He proceeded to examine Mr. Tayler on oath. The effect of this proceeding was that the evidence of Mr. Tayler was taken by the Judge in the absence of the Ranee, and though her vakeel was present, the subject of the enquiry was not whether she had a defence to the suit, but whether Khorshed Ali should be dismissed from his office as a pleader of the Court.

The Ranee had, therefore, no opportunity of cross-examining Mr. Tayler on the facts material to her defence; and we have already adverted to the manner in which the Judge allowed Mr. Tayler to evade answering plain and simple questions which Khorshed Ali put to him for the purposes of his own defence. The defendant's pleader having been thus overawed, intimidated, and virtually disabled on the eve of the trial, we should have felt it impossible to allow any weight to the decree in the Court below, even if the Judge had fully gone into all the issues which arose in the case. It became incumbent, therefore, on us to try the two cases without any regard to the findings of the Court below, as if they had been original suits before us.

We pronounce no judgment at present in these suits, because we think that the matters in dispute between the parties cannot be finally adjusted, and further litigation put an end to, until every claim by each party against the other has been adjudicated upon; and we, therefore, remand Nos. 420 and 421 to the Court of the Principal Sudder Ameen in which the evidence was originally taken in order that, if she pleases, the Ranee may give further and more detailed evidence in support of the alleged payment of rupees 33,650 by the Ranee's agents to Mr. Tayler; and that Mr. Tayler may have an opportunity of adducing evidence to show, if he can, that he has a right to exclude these sums from a general account between himself and the Ranee; and the Principal Sudder Ameen, after taking the evidence on this point, will remit the record to this Court as provided by Section 356.

The remand of No. 420 is a privilege to Mr. Tayler which the Court has had great doubts as to the propriety of conceding to him, because the issues having been properly laid down in the Court of the Principal Sudder Ameen, Mr. Tayler had a full opportunity of adducing the evidence to establish any answer he might have had to the set-off which was pleaded. He, however, deliberately chose not to adduce this evidence, induced the Judge to try the case on a false issue and stood by, while the Judge in No. 421 rejected evidence which Mr. Tayler knew to be true, and thereby gained a great temporary advantage.

We have now to deal with the order of the Judge for the prosecution of the witnesses, mohurir, and vakeel, Mahadeo, Churawan Lal, Ram Perkash Lal, Mahdoo, Ram Surun Singh, Bhikaree, and Khorshed Ali.

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In his judgment in the two principal cases, the Judge says that "there appears to have "been perjury committed," but he does not point out any statement in particular as false. He says, "further enquiry was re-"quisite, and accordingly in order to ascer-"tain how far the Ranee was responsible, I "resolved to examine her myself, as a com-"mission was likely to fail of the object in "view. Therefore, on the afternoon of the "4th ultimo, I expressed my intention of "proceeding the next morning to Tikaree "for that purpose. It was requisite that "long notice of such intention be not given; "else there was danger, considering who "the parties probably were to the dishonor-"able proceeding already on record, that "the Ranee might be tampered with. But "that both Bhikaree Lal and Khorshed Ali "were quite cognizant of the notice, and "had opportunity if they pleased of being "present at the examination, is evidenced "by the fact that her mookhtear, Situl Per-"shad, present in Court that day, was pre-"sent at Tikaree the next morning. Besides "they were present, the one as an agent, the "other as a vakeel throughout the cases "from the first order to the last. At 10-15 "A. M. on the 5th ultimo, I took her "deposition at her own residence, and "it convinced me that she had no per-"sonal cognizance of the statements put "forth in her name derogatory to the honor "of Mr. W. Tayler and it did not, there-"fore, appear to me how I could, on any pre-"tence, charge her with a crime under the "193rd or any other Section of the Indian "Penal Code. Consequently, I was not "justified in committing her to the Ses-"sions."

We can only suppose that the Judge imagined himself to be acting under the authority of the 202nd Section of the Code of Criminal Procedure. The deposition of the lady is put up with the papers in the miscellaneous petitions of Mr. Tayler against Khorshed Ali.

There is nothing upon the papers that leads to the inference that the Ranee was ever informed that she stood accused of any offence, much less what that offence was. The Judge never appears to have told her that, as she might criminate herself, it was in her option whether she would answer his questions or not.

The Judge appears to have taken the deposition of the Ranee in the matter of the petition for the removal of Khorshed Ali, and he uses her evidence against Khorshed Ali and Bhikaree Lal, as showing that Khorshed Ali was not acting in ignorance or in compliance with his client's instructions. Yet, not only is her evidence taken before the expiration of the time allowed by the Act to a vakeel to prepare his defence, but it is actually taken in the absence of the accused parties, Khorshed Ali and Bhikaree Lal. The proceeding was a great violation of law and justice.

The examination is headed, and is in substance as follows :—

"At the Deorhee of Asmedh Koonwar, "styled a Ranee at Tikaree, a lady behind "a purdah on solemn affirmation.

"My name is Asmedh Koonwar: my "age is 53 years; my dewan used to be "Hoormut Ali first, then Dost Mahomed, "and after him Dabee Nundun, who is now "my dewan. Gya Pershad is my servant "ever since I came to Tikaree: my vakeel "is Meer Khorshed Ali. Mr. W. Tayler "did act as my attorney in three cases: I "have laid a charge in the Judge's Court "against Mr. Tayler, because he said he "would get those three cases successfully "concluded for me,—one about my tuhseel, "one about making Hoormut Ali *behâl* as "my dewan, and one against some rent-"paying tenants. One case was successful. "I gave Mr. Tayler some money. There "was a bond in the time of Hoormut Ali; "it was written out by me, and he wrote my "name: I put my seal to it: that money "was not justly due to him, because there "were the three conditions to do the three "cases successfully: and Mr. Tayler says "that I have not paid him: therefore, I "lodged a complaint against him. I got a "black man from my serishtah in your "Court, and Bhikaree Lal, my moonshee, "prepared my papers. Question—Do you "know what is written in them? Answer—"The custom is that the papers are written "up in the serishtah at Tikaree here, and I "put my seal to them: that is the custom "from long ago. I hear them read first.

"The Meer Khorshed Ali is an old "vakeel of mine. He was not present "when I sealed the bond. My tuhseel "cutchery is here across the tank. Question "—Which side? Answer—Where of old my "serishtah stands. Question—Can you point "it out? Answer—Whence shall my rupees "come? [The deponent begins to weep, and "utters some incoherent and inaudible words "of lament.] I get some revenues, and so I "live on. Question—Has Mr. Tayler plun-"dered some money from your treasury?

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"Answer—No. Question—Has he stolen "any? Answer—Whence or how? Theft! "No, he has not. Question—Are you aware "that you have filed a charge against Mr. "Tayler of robbing you of money? Answer "—He has not robbed me of any money. "Question—Are you aware that there is "such a charge against him as in your "name? Answer—I know there has been "some—*a* 'naleesh.' Question—Can you "name any hoondee that you allowed to be "issued in 1268? in whose favor? on "what banker? Answer—I cannot tell. "Meer Khorshed Ali does not come here "often that I know of. Mr. Tayler has sued "me upon the bond. Question—What an-"swer did you file? Answer—Whatever "answer was that was given. Question—"Who usually prepares your legal papers "here? Answer—My dewan. I do not "know what particular work Gya Pershad "does."

On the 20th of August the petition of Mr. Tayler for the removal of Khorshed Ali from his office of vakeel came on for hearing.

Khorshed Ali's first plea is just, sensible, manly, and sound in law. He says:—

First.—"In the two cases I was vakeel "of the Ranee Asmedh, not of the petitioner, "Mr. Tayler: the Ranee has no accusation "against me: the petitioner, who was a "party in each suit, has no right to question "my conduct: the client is the person to "do that: and a pleader has a latitude to "say what he considers right for his client "against the world."

Secondly.—He denied all deceit. Since 1833 he said he had been a vakeel, and had the management of large zemindaries, and never was accused by any one or by any Court, of which there are many proofs.

Thirdly.—The Ranee is not such a purdahnusheen as alleged by Mr. Tayler: she has many cases and knows all about them. The lady denies petitioner's allegations. She complains of his taking more than was due to him.

Fourthly.—"I have not committed any contradictions in my deposition. The Principal Sudder Ameen did not find any."

Fifthly.—Says the Judge, "he complained of the Judge's abusive terms."

Sixthly.—"He has made a very long statement and irrelevant."

It is unnecessary to go in detail through the evidence which was taken on the 24th of August upon the petition. It principally goes to a case in which the witnesses charged Meer Khorshed Ali with having betrayed the interests of his patroness, Ranee Asmedh Koonwar, respecting a certain mokurruree lease of an estate called Dukhnair alleged to have been granted by her to Mirza Ikbal, and two contradictory depositions alleged to have been given by Meer Khorshed Ali respecting it. The second deposition alleged to have been in contradiction of the first was not produced at all. All that need be said is that, if it were true that perjury was committed in that case of which there was no evidence on which the Judge should have acted, it was for the Court before whom it was committed, and not for Mr. Russell, to take the matter up, and direct a prosecution. Mr. Russell allows the witnesses to go into other charges of taking fees, first from one side, and subsequently from another, of which the petition gave Khorshed no sort of notice.

In his decision the Judge alludes, *first*, to the fact that the bond was written by the dictation of Khorshed Ali; *secondly*, to the alleged discharge of Mr. Tayler on the 10th of February 1861, and that the documents and oral evidence show that he was active in her behalf in March 1861; *thirdly*, that Khorshed Ali was the chief native agent of the Ranee, and that Bhikaree Lal was his mohurir; as to his antecedents, that it was proved that he had given contrary depositions respecting the mokurruree lease, whereby the Ranee was put to move for a new trial; that in a case of Grish Chunder *versus* Shahzadah Khamun, he had at first taken a brief from the plaintiff and afterwards from the defendant; that in two other cases in which he was charged with having taken fees, he did so properly; that Khorshed Ali had before incurred the grave displeasure of Judges of this Court. The Judge, in this instance, apparently alludes to an order of Mr. Sandys, suspending Khorshed Ali from his office of vakeel, but which order was not upheld by the Sudder Court. The order was not even put in, and the witness, who spoke of it, said he knew something of it, but had forgotten what the offence was, it was so long ago. The Judge also alludes to some immaterial matters respecting Khorshed Ali's position in the Ranee's household.

He says, putting these various facts, none of which the defendant attempted to

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disprove or explain, and the strange inaction shewn in the records of the two original suits to prove the averments set forth in the Ranee's name, serious as they were, and needing the strongest proof, and "the "tone of his pleading in those cases as "recorded," "I cannot but conclude that "the present action on the miscellaneous "side is both reasonable and just and fully "substantiated, *viz.*, that defendant has "acted in an anti-professional manner as a "vakeel, and dishonestly also, and I therefore "direct the dismissal of Khorshed Ali from "his situation of vakeel in this district."

He goes on to state that, "as there seems "to be a *primâ facie* case made out that "defendant did instigate Bhikaree Lal, and "the two were in conspiracy together to "set up false evidence against Mr. Tayler, "which defendant has not yet attempted "to overthrow, but may still have oppor-"tunity to do so, he and also some of the "witnesses must be committed for trial."

The Judge seems to forget that, if they are to be committed for trial, it must be on some specific charge of making some particular and specific false statements; that there must be some direct and distinct evidence that each specific statement is false. We have carefully gone through the evidence at length in our judgment in case No. 420, which stands over for the present, and we find that there is no such distinct contradiction on the part of Mr. Tayler or his witnesses to any of the statements of the witnesses; but that the statements of the witnesses are throughout either substantially true, or uncontradicted by any evidence in the case, or, at least, such as, if not strictly accurate, may have been made in all honesty and good faith. Our difficulties have been greatly increased, and in case of the parties having been put on their defence on a criminal charge, these difficulties would have been enormously increased by the absolute want of all information as to the precise charges upon which the Judge meant to send them for trial.

With regard to Khorshed Ali, we need only say that, though he has been subjected to great injustice by the mode in which the charge was conducted against him, the charge has wholly failed in proof; that it is a most unheard-of proceeding for a defendant finding himself pressed by the skill and outspoken intrepidity with which a cause is conducted against him by the advocate of the opposite party, to endeavor to disable his opponent and intimidate his sole counsellor by charging such counsellor with betraying his opponent's interests.

We reverse the decision of the Court, directing the removal of Khorshed Ali from his office as a vakeel, and the prosecution of the mohurir and all the witnesses, with full costs and interest to be paid by Mr. Tayler.

The 26th January 1864.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Estoppel — Family Custom — Hindoo Law—Inheritance — Evidence — Intermarriages—Legitimate children.

Case No. 448 of 1861.

Regular Appeal from a decision passed by Captain G. N. Oakes, Deputy Commissioner of Maunbhoom, dated the 28th November 1861.

Rajah Nugendur Narain (Plaintiff) *Appellant,*

versus

Rughoonath Narain Dey (Defendant) *Respondent.*

Mr. R. T. Allan and *Baboos Kishen Kishore Ghose* and *Juggodanund Mookerjee* for Appellant.

Moonshee Ameer Ali and *Mr. John Baptist* for Respondent.

Suit laid at Rupees 12,454-6.

A party to a suit is not estopped merely by the reasons which a Judge may give for his decision. In order to make out that the decision in a former suit is an estoppel, it must be established that the same identical question has been formally raised and finally decided

To establish a family custom at variance with the ordinary law of inheritance, it is necessary to show that the usage is ancient and has been invariable, and it should be established by clear and positive proof.

The family custom as to intermarriages, being matter of family history, may be proved by declarations made by members of the family.

The Hindoo Law makes no distinction between legitimate children born of mothers of the same caste.

Norman, J.—THIS is a suit by the plaintiff, alleging that his father, Rajah Choitono Narain Deb deceased, zemindar of Pergunnah Foolkoosunah, having died in Maugh

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1261, the plaintiff was. by the custom of the family and of the country, entitled to succeed to the moveable estates and the zemindary of his late father. The defendant pleaded that there had been a suit between the plaintiff and himself for ascertaining who was entitled to the estate belonging to the Raj and to become Jubraj, and to succeed his father in the Raj, and that the same was decided in favor of him, the defendant, and therefore that the suit was inadmissible.

The suit in question was instituted by the present defendant, Roghoonath Narain, against Rajah Choitono Narain Deb, and the now plaintiff, Mookoond Narain, in the Moonsiff's Court on a valuation of Rs. 300.

The plaintiff alleged that Roghoonath Narain was the son of the Rajah, defendant. That it was customary in the family to make the son born of the Paatranee (or chief Ranee) the Jubraj, and to grant him a maintenance of Rs. 300 a year, or property of that value as maintenance till he succeeded his father by right of inheritance; that he, Roghoonath Narain, was the son of the first and lawfully married Paatranee, and had ever since the day of his birth been maintained as Jubraj; that, during his minority, he was maintained by the Rajah, and, since his coming of age in 1251, was confirmed in the post of Jubraj, and received, in lieu of the maintenance of Rs. 300 a year, or its equivalent in landed property, a certain estate called Hurrinabad, which had been enjoyed by his father and grandfather respectively while Jubraj; that he having instituted suits for the recovery of rent against the tenants, a counter-suit was instituted through the machinations of the then defendant, Mookoond Narain, the son born in the womb of a wife of the Rajah, in whose hands the Rajah would not take cooked rice; that Mookoond Narain is the daughter's son of the zemindar of Silda who are Bhegurbhati, or, in other words, whose rice could not be taken by the Rajahs of Foolkoosunah, or of any other place in this part of the country; and, therefore, according to the custom of the country, he is not fit to get the Jubraji, or the Rajgee. The plaintiff, therefore, sued to recover Rs. 300 yearly in the shape of maintenance, and to get himself declared Jubraj.

The Rajah and Mookoond Narain pleaded separately to the effect that the alleged custom of inheritance of the zemindary, *viz.*, that the son of the Paatranee should be Jubraj, and succeed to the Rajahship does not prevail; that the eldest son, whether born in the womb of the Paatranee, or of any other wife of the Rajah, becomes Jubraj and afterwards Rajah; that Mookoond Narain is older than the plaintiff, and, being the eldest son, is entitled to succeed to the zemindary according to the custom of the family; that he has been made Jubraj, and as such entrusted by the public officials of the district with all the duties connected with the zemindary; that the alleged practice of Bhati and Bhegurbhati does not prevail in the family of the Rajah; that all the wives are equal, and rice is taken from the hands of all; that the family of Silda is not such that the Rajah cannot eat their rice; that intermarriages have prevailed between the family of "Samunt," from which Mookoond Narain's maternal grandfather was descended with the Dhols and other Rajpoot families, including that of the Rajah; and a case decided in the Court of Midnapore was referred to as shewing that allegation to be true.

The plaintiff replied alleging that, by the custom of the family, the son of the Paatranee, whether first born or otherwise, always succeeds to the Raj; that the intermarriages have not taken place between the Rajah's family and the family of Samunt; and that by the family custom, it is forbidden to take rice or drink from Silda, Samunts, or Soorbhans. The father further alleged that the sum of Rs. 300 was never fixed as the maintenance of the Jubraj; that, while he was Jubraj, he received the profits of a property amounting to Rs. 155, and that Mookoond Narain has received Rs. 162, and that he had allowed Rs. 140 to plaintiff out of kindness, and that the Rajah never ate rice cooked by the defendant Mookoond Narain's mother.

The Moonsiff laid down issues, *first*, "whether the plaintiff is the son by the Bhati Paatranee, and the defendant, Mookoond Narain, by his Bebhati wife, or whether both are the sons of wives equal in point of caste;" and *second*, "whether, if both the sons are born of Ranees treated equally, the plaintiff being the son of the Paatranee or Mookoond Narain, as the eldest son is entitled to the disputed allowance—the right of Jubraj;" *third*, "whether the sum of rupees 300 is allowed annually as an allowance to the Jubraj in the family."

There was also an objection to the suit on the ground that it was valued only at rupees 300, not putting any valuation on the claim of Jubrajship.

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The Moonsiff, whose decision was confirmed by the Deputy Commissioner, Captain Oakes, found that Rughoonath Narain was the Bhati son of the first wife, and Mookoond Narain the son of an untouchable Bebhati Ranee; because, he says, it was proved by a certain decision of the Judge at Midnapore that Sooburnomonee, the mother of Mookoond Narain, was an illegitimate daughter of Ranee Thacoormonee, wife of Rajah Maungobind Dhalal, zemindar of Silda, and the defendant, Choitono Narain, instead of obtaining her hand in legal marriage, took her in Gondhorbo marriage. Hence it is clearly evident that, instead of being the son of a Bebhati Ranee, as alleged by the plaintiff, the defendant is the son of a still more untouchable Ranee. He goes on to say that Rughoonath Narain is certainly entitled to the Jubraj's khoreposh in preference to Mookoond Narain, inasmuch as Mookoond Narain, being the son of an unlawful Ranee, cannot at all, according to the Shasters or Hindoo law and reason, be held as an heir to Choitono Narain. In answer to an objection that the suit was not properly valued, the Moonsiff held that the claim to the rank of Jubraj was not a claim to land or other property, nor was there any land attached to it; that the valuation of the claim at the amount of khoreposh allowed to a Jubraj was sufficient; and that the decision in the khoreposh case could not be such that in the execution thereof any one should obtain a title to the Raj. It may be doubted whether he was right in entertaining the suit at all; whether, in fact, he ought not to have dismissed it on the ground that, the title to the Raj coming in question, the suit was not properly valued, and that, in fact, he had no jurisdiction to try it. He, however, gave a decree for the khoreposh allowance at Rupees 172 against Choitono Narain, and costs against both the defendants, which we must take for what it is worth.

We have now to decide whether the now plaintiff, Mookoond Narain, is estopped by that decision from alleging that, as his father's heir, he is entitled to succeed to the Raj.

The rule of law in this subject is thus stated by Lord Ellenborough, Outram *vs.* Morewood, 3 East, 346 :—"If a particular fact or title is put in issue in one action or suit, the finding of fact upon such issue may effectually be pleaded and relied upon as conclusive in any other suit between the same parties or those claiming under them respectively."

The *first* question is was Mookoond Narain regularly a party to the former suit on the issues in it so as to come within the rule? The Moonsiff points out that the suit was not one for a declaration of the right to succeed to the Raj, but simply for a money allowance which would be paid by Choitono Narain. If he is right in that, the issue was really one between Rughoonath Narain and his father; and it is difficult to see how Mookoond Narain could have carried on the appeal, if Choitono Narain had at any time chosen to submit and pay the allowance claimed with the costs. If he had not the full rights of a party to the suit, it is not easy to see why he should be concluded by the decision. This point could not have arisen in a Court of Justice in England, and we do not think it necessary to decide it now, but it is one which may well deserve careful consideration hereafter in cases which may arise under the custom, which has hitherto prevailed in this country, of making people defendants who are only remotely, if at all, affected by the decree in the suit.

Secondly, the object of the suit was to establish the right of Rughoonath Narain to the allowance claimed. If this were a suit between Rughoonath Narain and Choitono Narain to try whether Rughoonath Narain was entitled to this allowance, no doubt Choitono Narain would have been estopped. The decree in the suit does not estop the now plaintiff, but it is urged that the same point, which is in issue in this suit, was in issue, and decided in the former suit. We may observe that the issue raised in the former case, whether Ranees of the Silda family were Bebhati, and whether Mookoond Narain, as the son of such a Ranee, could be entitled to the Jubraj allowance, so as to exclude Rughoonath Narain, was not tried at all. That which the Moonsiff did decide, *viz.*, that he was son of the illegitimate daughter of the Silda Rajah, was apparently not even alleged by the plaintiff. It was not in issue at all. A party to a suit is not estopped merely by the reasons which a Judge may give for his decision. In order to make out that the decision in a former suit is an estoppel, it must be established that the same identical question has been formally raised and finally decided. But, as we have seen, the question, whether the plaintiff's mother was the illegitimate daughter of the Silda Rajah, was not raised, and the question, whether the Ranees of the Silda family are Bebhati or not, or whether Mookoond Narain, as the son of such a Ranee, could succeed to the Raj to the

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prejudice of the son by a Ranee not denied to be a Bhati Ranee, was not decided. The plaintiff, Mookoond Narain, is therefore not estopped from trying either of those issues in the present suit.

We should have much regretted it had we found ourselves bound by the former decision, because it appears to us to have proceeded on mistakes, both as to the law and the facts of the case, and indeed is chiefly based on the finding of fact in a third case which has since been shown to have been erroneously decided.

The point in issue between the parties is, whether the plaintiff, as the eldest son of Rajah Choitono Narain deceased, is entitled to succeed to the Raj.

It is not disputed that, according to the custom of inheritance in the family in question, the succession to the estate devolves to a single heir, to the exclusion of the other heirs of the deceased (*a*). The plaintiff is the eldest son, and therefore presumably would be the successor of his father, to the exclusion of a younger son. But the defendant, who is a younger son, claims the inheritance on the ground that the plaintiff is the son of a Ranee of the Silda family who was Bhegurbhati, or, in other words, could not eat rice with the late Rajah; and in order to succeed, he must prove a koolachar, or family custom, to that effect. Now, in order to establish a family custom at variance with the ordinary law of inheritance, it is necessary to show that the usage has been ancient and invariable, and it should be established by clear and positive proof (*see* S. D. A. Rep. 1856, page 399.)

(*a*) *See* Regulation X of 1800.

We will examine whether any such family usage, as supposed by the defendant, has been shown to exist. It appears that the family of the Rajahs of nine Mehals in the Jungle Mehals are of higher dignity than the other Rajpoot families. One of these is the Tong family, that of the Rajah of Foolkoosunah; others are the Dholl, Mull, &c. The Samunt and Soor families, though Rajpoots and Khetryas, are considered of somewhat inferior grades.

The plaintiff's evidence is as follows:—Rajah Choitono Narain, the father, gave his evidence on oath in the suit respecting the Jubrajship allowance on the 23rd September 1847. He stated that his wife Sooburnomonee, the mother of the plaintiff, was of the same caste with himself, that people of his own clan ate rice from her hand, and Mookoond Narain, his son, was entitled to succeed to the Raj.

On the 25th of March 1822, in a suit for the possession of a zemindary by Kumolakanth Dholl against Muddun Mohun Mohapattur and others, Rajah Durponarain, the father of Rajah Choitono Narain, and grandfather of the plaintiff and defendant in this suit, was summoned as a witness. He was not examined on oath, but he presented himself in the Zillah Court of Midnapore, in the presence of the vakeels of both parties, and filed a written statement under his seal, the correctness and truth of which he declared. Upon this an order passed that the statement be placed on the record. This document was received in the Lower Court, but was objected to before us by Baboo Unnoda Pershad Banerjee, on the ground that the statement was not upon oath. Mr. Allan proposed to put it in as evidence of the family custom as to intermarriages between the Tong and Samunt Rajpoots.

After hearing the objections, we determined to admit it upon the ground that the family custom as to such intermarriages, being matter of family history, ought to be proved by declarations made by members of the family. We think that the case falls entirely within the principle of the rule which is ordinarily applied in pedigree cases. (*See* Taylor on Evidence, 2nd edition, page 503. Roscoe on Evidence, 34.)

Rajah Durponarain's statement was in substance as follows:—"Between the Tong "Rajpoots and the Samunt Rajpoots inter-"marriages are allowed. I am of the family "of the Tong Rajpoots. My grandfather "and father married into the Samunt Rajpoot "family. I married the daughter of Oodoy "Coomar, who is of the Samunt Rajpoot "family. My son, Choitono Narain, married "the daughter of Rajah Maungobind, ze-"mindar of Pergunnah Silda, of the Samunt "Rajpoot family. Kumolakant is the son "of the daughter of Rajah Gopeenauth, of "the Samunt family. There is eating and "drinking between us."

By the decree in the last mentioned suit dated 22nd April 1826, Kumolakant Dholl, though the son of a Samunt mother, was put in possession as heir of the zemindary. It was further proved that Mookoond Narain had been appointed surburakar in his father's lifetime, and at his request; that he had been addressed and, previously to the decision in the first mentioned case, treated as the Chota Rajah or Jubraj of Foolkoosunah; and the

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plaintiff called several witnesses to prove that all the Rajahs ate rice with him, and also with Sooburnomonee, his mother. Some of the witnesses state that none but those who marry into the family of the Rajah of Silda eat with that family. It was further proved that Rajah Gopeenauth Dholl, the grandson of a Samunt by his mother's side, had become Rajah of Umbiccanugger, one of the nine Mehals.

In the course of the case, certain depositions of witnesses who had been examined in former suits and proceedings between the same parties were referred to. They appear to have been received, without objection, in the Court below. But it was objected before us that they were inadmissible, inasmuch as it was not shown that the witnesses were dead or could not have been called. (*See* Taylor on Evidence, Vol. 1, page 394, 2nd edition.) But as the objection was not taken in the Court below, and was one which might have been answered, or the objection removed if it had been taken below, we disallowed it.

The defendant attempted to narrow the issue to the question whether the plaintiff was the son of a Bebhati Ranee. His evidence went to show that the daughters of Samunts marrying into the nine families do not become Bhati; that the offspring is Bhati; that the sons of Tongs and Dholls, who are Koolins, marry into the Samunt and Soor families, who are Mullicks; but the Tongs and Dholls do not give their daughters to Samunts and Soors. Hurryhur Sing, Rajah of Raipore, a Mull, and Rajah Jugdeebun Lall, stated that, if the Foolkoosunah Rajah marries into the Silda family, the wife is Bhegurbhati. The son born of that marriage cannot attain to the Raj. All that can be said is that this is no more than the opinion of the witnesses in the particular case before the Court. It is, moreover, worthless as evidence, *first*, because they are not of the Tong family; *secondly*, because it is contrary to the proved facts as regards the families of other Rajahs in the nine Mehals; and *thirdly*, because it goes merely to opinion and not to matters of fact.

Rajah Soondonarain, who is of the Foolkoosunah family, says that the son of a Ranee of the Silda family cannot succeed if there is a grandson of the Foolkoosunah family.

The conclusion is that there is absolutely nothing in the evidence to show that the son of a Ranee of the Samunt family may not succeed to the Raj in the Tong or Foolkoosunah family; that, on the contrary, there is strong evidence that he may do so. No single instance has been cited or referred to in any of the proceedings to show that, amongst the legitimate sons of these Rajpoot families, the claim of an elder son born of a Samunt mother has been treated as subordinate to, or postponed to, that of a younger son, born of a Ranee of one of the nine families. And there is nothing in Hindoo Law to countenance such a distinction between legitimate children born of mothers of the same great caste. All the parties here appear to be Khetryas.

We, therefore, reverse the decision of the Court below, and decree the claim of the plaintiff with wassilat from the death of Choitono Narain, costs, and interest.

The 27th January 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Witnesses (Examination of parties as).

Case No. 207 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 31st January 1863.

Thakoor Laith Narain Deo (Defendant) *Appellant,*

versus

Bolakee Chowdhry (Plaintiff) *Respondent.*

Baboos Onookool Chunder Mookerjee and *Debendro Narain Bose* for Appellant.

Baboos Khettur Mohun Gangooly and *Ramnath Nundee* for Respondent.

Suit laid at Rupees 7,466.

When a plaintiff alleges that the defendant has a personal knowledge of the matters in dispute, and the defendant denies that he has such knowledge, the Court, before exercising the discretion of decreeing the suit as upon default, should be satisfied on evidence as to the existence of such knowledge on the part of the defendant.

Bayley, J.—In this case the plaintiff sued to recover the sum advanced on two specific bonds. Plaintiff alleged that there had been a farming lease given to him by defendant's father; but that on "defend-

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ant" coming to an amicable adjustment of the accounts between the parties, those bonds which were found to have been satisfied by the proceeds of the farming lease were returned to defendant; but that such farming lease and such adjustment had no reference whatever to the two bonds on which this suit is brought, and were totally irrespective of them.

The defendant's answer is to the effect that the two bonds on which plaintiff sues were given to plaintiff by defendant's father; but that they were satisfied by the proceeds of the farming lease. Defendant averred that he had no personal knowledge of the facts or details; but that he came to this conclusion from an inspection of the family zemindary accounts, and that the mere rental of the farming lease showed *primâ facie* that the satisfaction of the bonds could be obtained by the profits of the farming lease.

Plaintiff summoned defendant as a witness. Defendant pleaded that he had no personal knowledge of the transactions; that he was sick, and was of a position in life which should exempt him from personal attendance upon the Courts.

The Principal Sudder Ameen, *without going further into the proofs of the parties, and without showing that he was satisfied that defendant had the personal knowledge* of the transactions of his father which he denied he had, or how plaintiff had shown this fact, held, as to the plea of exemption, that the defendant's pleas for non-attendance were the usual idle excuses; that there was no medical certificate as to illness, and no entry of defendant's name in the list of exempted persons furnished to the Courts by Government. The Principal Sudder Ameen then decreed plaintiff's case on defendant's *default* to appear, and did so specifically under the provisions of Act VIII of 1859.

Defendant appeals and urges as his first ground (and for the present purposes of the case we need not go farther) that he is even now willing to give his deposition, but that the very law relied upon by the Court below clearly contemplated that there should be some record of the *primâ facie* evidence at least on which a Court comes to the conclusion that a party has that personal knowledge of the facts which such party upon a verified statement denies, and which denial, strongly supported, as in this case, by the admitted fact that the bonds upon which this suit is brought, and, in fact, all the obligations to which plaintiff refers, were transactions of defendant's father and not of defendant.

The plaintiff's pleader, on the other hand, refers to his written statement wherein it is clearly alleged that "defendant," that is, defendant *himself personally* entered into an amicable adjustment with plaintiff, settling accounts upon the farming lease as to *certain* bonds *then returned*, leaving *the two bonds*, the subject matter of this suit, not included in that adjustment, and that, therefore, there is sufficient evidence of *personal* knowledge in defendant.

Judgment.

We do *not* think that, in a case like this, where really it is simply this, that plaintiff alleged defendant has a personal knowledge of the matters upon which he was called upon to depose, and defendant denied that he had such knowledge, while however plaintiff is not called upon by the Court to give any proof whatever, and does not give any proof that there is personal knowledge in defendant, the Principal Sudder Ameen exercised properly that large and responsible discretion with which the law vests him, *viz.*, of decreeing such large and important claims upon default, when the legal ground upon which such default is pleaded to be excused by the Code itself, *viz.* absence of personal knowledge remains entirely unadjudicated upon any proof adduced by the party asserting the existence of such knowledge in his opponent. The Legislature had for its object in the enactment under which the Principal Sudder Ameen has proceeded that the *best available evidence* should always be at the Court's command; and, for this purpose, the knowledge of the parties of their own acts was naturally supposed to be the basis of the best available proof. But it was never intended by the Legislature (as indeed the terms of the law show in requiring the Court to be *satisfied* of the existence of the personal knowledge) that mere contradictory assertions should satisfy the judicial mind, or that legal proof should not be required of such a fact by the party alleging it, as of any other fact which requires proof before it is to be adopted as a ground of a decree. The decision, as it stands, is not in accordance with the legal maxim that such decision should be according to the pleadings *and proofs*, but is according to the contradictory pleadings only.

We, therefore, reverse the decision of the Court below, and remand this case in order

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that plaintiff may give at least *primâ facie* evidence in support of his allegation that defendant himself has personal knowledge of these transactions, and if plaintiff does so, then the defendant may be summoned, and the law take its course. In such a case as this, too, *this* Court would certainly think it a proper exercise of the general power vested in the Civil Courts to examine *both* parties.

Remand accordingly. Costs to follow eventual result.

The 27th January 1864.

Present:

The Hon'ble G. Loch and J. P. Norman, *Judges.*

Attachment—Reversal of sale.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 17th November 1862.

Case No. 17 of 1863.

Gunno Singh (Defendant) *Appellant,*

versus

Baboo Muddun Mohun Singh and others (Plaintiffs) *Respondents.*

Baboos Dwarkanath Mitter and *Debendro Narain Bose* for Appellant.

Mr. R. T. Allan and *Baboo Unnoda Pershad Banerjee* for Respondents.

Appeal valued at Rupees 5,000.

Case No. 54 of 1863.

Baboo Raj Coomar Singh and others (Plaintiffs) *Appellants,*

versus

Roop Narain Singh and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Moonshee Ameer Ali* for Appellants.

Baboos Unnoda Pershad Banerjee, Dwarkanath Mitter, Ashootosh Dhur, Kedarnath Chatterjee, and *Khetturnath Bose* for Respondents.

Appeal valued at Rupees 33,763.

Case No. 67 of 1863.

Ajar Sahoo and others (Plaintiffs) *Appellants,*

versus

Baboo Muddun Mohun Singh (Defendant) *Respondent.*

Baboo Ashootosh Dhur for Appellants.

Baboo Luckhee Churn Bose for Respondent.

Appeal valued at Rupees 346.

Case No. 68 of 1863.

Debee Pershad and others (Defendants) *Appellants,*

versus

Baboo Muddun Mohun Singh (Plaintiff) *Respondent.*

Baboo Ashootosh Dhur for Appellants.

Baboo Luckhee Churn Bose for Respondent.

Appeal valued at Rupees 346.

Case No. 69 of 1863.

Thakoor Chund (Defendant) *Appellant,*

versus

Baboo Muddun Mohun Singh and others (Plaintiffs) *Respondents.*

Baboo Ashootosh Dhur for Appellant.

Baboo Luckhee Churn Bose for Respondents.

Appeal valued at Rupees 346.

Case No. 70 of 1863.

Ram Lal Sahoo (Plaintiff) *Appellant,*

versus

Baboo Muddun Mohun Singh and others (Defendants) *Respondents.*

Baboo Ashootosh Dhur for Appellant.

Baboo Luckhee Churn Bose for Respondents.

Appeal valued at Rupees 346.

An attachment once legally made is revived upon the reversal of the sale in execution.

Loch, J.—THE facts of this case as laid down before us are as follows:—Bhugwan Dutt got a money-decree against Nundhun Singh, the father of Taik Narain and Roop Narain on 6th September 1838; and in execution which appears to have taken place after the death of Nundhun Singh, attached and caused to be sold, on 20th June 1844, Mouzah Dhama and other villages, the property of the deceased, which were purchased by Mohesh Koonwaree. After the sale Taik Narain, for himself and as guardian of his younger brother Roop Narain on 2nd October 1848, executed a deed of sale in favor of Resul Singh, of half the property sold, for Rupees 5,000, for the purpose of obtaining his assistance in bringing an action in the Civil Court to set aside the sale. The two brothers and Resul Singh then instituted a suit to set aside the sale and obtained a decree in the Zillah Court on 19th December 1853, which decision was affirmed in appeal by the Sudder Court on 22nd November 1857, on the ground that

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the sale had not been conducted with all the formalities prescribed by law.

During the interval which elapsed between the sale and the judgment aforesaid, the decree-holder Bhugwan Dutt applied for, and obtained, the purchase-money paid in by Mohesh Koonwaree. On the sale being reversed, the latter demanded repayment and brought an action to recover the amount; and on 22nd September 1860 obtained a decree against Bhugwan Dutt and other decree-holders who had appropriated the purchase-money, Resul Singh, whom she had made a party to the suit, being released from the claim. In execution of the decree against Bhugwan Dutt, she attached and caused to be sold the decree held by him against Nundhun Singh, and purchased it herself on 1st April 1861, and obtained the sale certificate on 1st May following, and thus became substituted as decree-holder against Nundhun Singh, in the place of Bhugwan Dutt. She put this decree in execution against the half of the property which remained in the hands of the heirs of the judgment-debtor and caused it to be sold on 5th August 1861; but as the proceeds of that sale were insufficient to satisfy the whole of her claim, she instituted the present suit to set aside the deed of sale executed by Taik Narain and Roop Narain in favor of Resul Singh, now represented by Gunnoo Singh, on the ground that such sale was collusive, and to enable her to bring the said property to sale in satisfaction of her decree.

The defendant Gunnoo Singh pleaded, 1*st*, limitation; 2*nd*, that the original attachment and sale not being made according to law, the proprietors were not debarred from making a private sale to Resul Singh; and 3*rd*, that the sale was made under the pressure of necessity, and was not collusive.

The Principal Sudder Ameen rejected the plea of limitation; and on the merits set aside the sale to Resul Singh in regard to Mouzah Dhama, but rejected the plaintiff's claim in regard to Mouzahs Bhedas, Bishunpore, Sunto, and Khagurya.

Two appeals have been preferred to this Court: one by Gunnoo Singh to set aside that portion of the decision of the Lower Court, which declares the purchase by Resul Singh of Mouzah Dhama to be invalid; and the other by Muddun Mohun Singh, the representative of Mohesh Koonwaree, to reverse the judgment of the Principal Sudder Ameen in respect to the villages Bhedas and others.

Four other appeals Nos. 67, 68, 69, and 70 on the point of costs have been filed; and at the hearing of the appeal, another objection was taken by one of the defendants on the point of costs, and admitted under Section 348 Act VIII of 1859.

We propose to dispose of the appeal of Gunnoo Singh in the *first* place. Limitation is pleaded. It is urged that the original judgment passed on 6th September 1838 was never put in execution against the moiety of this property sold to Resul Singh, till the institution of the present suit; for though a sale took place in 1844, that sale and all the proceedings connected with it have been set aside, and the property was then sold as belonging to Rohinee Koonwaree, the mother of Taik Narain and Roop Narain; and the execution case was finally struck off in March 1849, and the present suit was instituted on 30th September 1861.

The plea of limitation we hold to be utterly untenable. The original decree-holder sold the whole of the property comprising the moiety now held by Gunnoo Singh in 1844. Litigation to set aside that sale commenced in 1853, and was continued till November 1857, and the present action was brought in 1861. It was not till the final judgment was passed by the Sudder Court in 1857 that Resul Singh's deed of sale operated, and consequently that any right of action to set it aside accrued.

In the *second* place, it is urged that the sale of 1844 having been set aside, the judgment-creditor, if he sought to sell this moiety of the property in execution of his decree, should have proceeded to attach it in the usual form, as he did in the case of the other moiety retained by the judgment-debtors in their own possession; that the effect of the reversal of the sale was to set aside all previous proceedings taken in execution; and as the attachment taken out, which was not an attachment previous to judgment under Regulation II of 1806, but an attachment subsequent to, and in furtherance of, the decree, had been virtually declared by the decision of the Sudder Court in 1857 to be void, the sale to Resul Singh must be considered valid, unless fraud or collusion could be proved, and this plaintiff had failed to show. The decision of November 1857 setting aside the sale cannot be said to have revived the attachment and put things into the position they were before the sale, for had such been the case, plaintiff, instead of bringing his action to set aside the private sale to Resul Singh, would

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have applied to the execution department in order to have the property sold in satisfaction of his decree. The course adopted by the plaintiff shows what to his mind was the effect of the reversal of a sale in execution, *viz.* that all previous proceedings in execution became null and void, a view supported by the practice of the Courts. Further, as the execution case was struck off the file in 1849, it was necessary, as ruled by sundry decisions* of the late Sudder Court, in order to a sale of the property, that all steps in execution should be taken *ab initio.*

* Decisions of 1856, pages 247 and 253.

We find that the Sudder Court, in their decision of 22nd November 1857, set aside the sale of 1844 not from any defect in the attachment, but from some informality in issuing the proclamations of sale, and the question for us to determine is whether the effect of that decision was to set aside the whole of the proceedings in execution, so as to make it incumbent on the judgment-creditor, wishing to make this property liable to sale in satisfaction of his decree, to commence execution proceedings *ab initio*, or whether it merely set aside the sale, leaving all things which had been rightly done in execution as they were, and, in short, reviving the attachment of the property made by the original judgment-creditor.

It may be premised that, in the transaction between Taik Narain and Resul Singh, we see nothing collusive or fraudulent. The whole is perfectly above board, and the fact that the representatives of Resul Singh are in possession of the property sold to him under the deed of sale of 2nd October 1848 is conclusive of the good faith of the parties. If, therefore, the Court hold that the effect of the decision of 1857 was to set aside all proceedings taken in execution previous to the sale of 1844, the attachment of the property becomes null and void, and the sale to Resul Singh, under such circumstances, cannot be disturbed. If, however, the Court consider that the reversal of the sale in 1857 left other things as they were and revived the attachment, then Taik Narain sold, and Resul Singh purchased, what both parties knew they had no power to sell or purchase, and, however fair they may have been in their mutual dealings, the sale, so far as it is to the prejudice of the attaching judgment-creditor, must be set aside. It cannot be pleaded for Resul Singh that he was a stranger purchasing without notice and in good faith for a valuable consideration, for it is evident from the deed of sale which he obtained, as well as from the whole course of the previous litigation, that he knew that this property had become liable for the amount of the decree held by Bhugwan Dutt, that it had actually been sold in satisfaction of that decree, and in fact he purchased, with his eyes open, a share in the litigation that was then to be commenced for the recovery of this property.

We may observe that, by the attachment which was under the repealed Regulation XLV of 1793, it was ordered that, until the sale, the Nazir should keep the property under attachment.

After considering the subject in all its bearings, as put before us by the pleaders of either party, we come to the conclusion that the effect of the late Sudder Court's decision of 22nd November 1857 was only to declare the sale to be null and void, but without prejudice to the attachment or other proceedings in execution which had been rightly and legally performed. We think that, by the setting aside of the sale, the parties were simply remitted to the position in which they stood immediately before the sale, and therefore that the attachment must be deemed to have revived. We think that we are supported in this view of the case by the decision of the Privy Council in the case of Rajah Mohesh Narain Singh *versus* Kishanund Misser, reported in Part 5, Volume VII of Sevestre's Reports, and bearing date 9th December 1862. This was a suit to set aside a sale of landed property made in execution of a decree. The property, it appears, had been sold four times, and the sale each time had proved ineffectual because the highest bidders turned out to be mere nominal purchasers. It was objected that the sale which ultimately took place was void on account of non-compliance with the provisions of Regulation XX of 1795 then in force, "that, when "any Court of Civil Judicature shall have "occasion to sell lands in satisfaction of a "decree, it shall transmit a copy thereof to "the Board of Revenue, which is, with all "practicable despatch, to cause the lands to "be disposed of at the Presidency, or in the "district in which the lands are situated, "&c." But the Privy Council thought that the objection was properly overruled by the Zillah and Sudder Courts, because, when a former order for sale had been made by the same Court in 1843, this Regulation had been complied with. And on this, their Lordships remark:—"It would be contrary "to general principles and a senseless addi-

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"tion to all the vexations and delay in the "course of procedure to hold that, when for "any reason, satisfactory or not, the exe-"cution of a final decree in a suit fails or is "set aside, and the proceedings as regards "that execution are taken off the file, the "whole suit is discontinued thereby, and the "further proceedings for the same purpose "are to be considered as taken in a new "suit." And we think that, were it otherwise, great injustice would be done to the judgment-creditors. For what is the position he would find himself in on the reversal of a sale, if all the steps he had properly taken in execution were to go for nothing. It would be this. The creditor, after publicly attaching the property and thereby declaring to all the world that he had made it legally liable for the satisfaction of his debt, and taking every necessary step for the sale of the property, would find, in the event of the sale being set aside, for some flaw in the proceedings with which he had nothing to do, and over which he had no control, that a third party, a stranger to him, had, with the view of assisting the judgment-debtor to set aside the sale, purchased from the judgment-debtor the whole or a part of the property, and on the reversal of that sale holds him at arm's length and tells him—"True, you made this property legally liable for your debt; but owing to a flaw in the subsequent proceedings, the sale was invalid; I took advantage of this defect, purchased the property, assisted in getting the sale reversed, and now you must look elsewhere than to this property for the satisfaction of your claim." What, if the debtor have no other property than what he has sold to the interpolator, is the judgment-debtor to do? His decree becomes so much waste paper.

With regard to the decisions* of this Court quoted by the appellant's Counsel, to prove that where an execution case has been removed from the file, proceedings must be commenced *ab initio*, it is sufficient to say that the circumstances of those cases are entirely different from that now before us. In those cases the decree-holder, after taking certain steps in furtherance of execution, proceeded no further with his case, which was struck off for default. That is very different from the circumstances under which this execution case was struck off in 1849. A sale had taken place, and, as far as then appeared, the decree had been satisfied, and it could therefore serve no good purpose to retain the case on the file; but such order was never intended to have, and could not have, an effect injurious to the creditor's interests on the sale being reversed. For these reasons we dismiss the appeal of Gunnoo Singh with costs, and affirm the decision of the Lower Court.

* S. D. A. Rep. 1855, page 244, Goburdhun Singh, Appellant; 1856, March 13, page 247; 1856, March 20, page 257.

The appeal of Muddun Mohun Singh relates to Mouzah Khagurya, 4 annas purchased by Hem Chand Singh, representative of Resul Singh, and father of the defendant Gunnoo Singh and others, under a deed of sale dated 3rd October 1855; to half Mouzah Aboona Tal-Bhedas, purchased by Hem Chand at a sale in execution of a decree held by Oojhar Sahoo on 17th August 1847; and to Mouzah Bishunpore Santo, purchased by Onoop Mundur, on 9th January 1854, as guardian of Ramnarain.

With regard to Mouzah Khagurya, it is not denied that Hem Chand Singh was a purchaser with notice. The Principal Sudder Ameen, however, states that the sale was effected after the decree of reversal of sale had passed, so that the vendor was then competent to transfer; hence such sale, the auction sale being cancelled, and the former attachment being rendered inoperative, is valid. We differ entirely from the view here taken by the Principal Sudder Ameen, and in the former part of this decision we have given our reasons for considering the attachment once legally made to be revived upon the reversal of the sale. On this point, therefore, we reverse the decision of the Lower Court.

As regards Mouzah Aboona Tal-Bhedas, the Principal Sudder Ameen states that the claim is barred by limitation. It appears that, for some reason not explained, Tal-Bhedas was excluded from the sale held in 1844; and on 17th August 1847 Rohinee Koonwaree, mother of Taik Narain and Roop Narain, gave this property on a zur-i-peshgee lease to Oojhar Sahoo and Gangoo for a consideration of rupees 10,000. The lessees, unable to recover the money advanced by them, sued and got a decree on 26th July 1851 against the sons of Rohinee Koonwaree, who had by that time attained their majority, for possession and mesne profit; and ultimately sold the property in execution, when it was purchased by Gangoo, Ram Churn, and Ram Lal Sahoo, the last of whom sold his rights and interests to Debee Pershad Mongeree, nephew of Oojhar Sahoo.

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It is alleged that the decision of the 26th July 1851 was subsequently reversed by the Sudder Court, and that on 29th November 1850, shortly before the decree of 1851 was passed, Oojhar Sahoo executed an ekrar to Roop Narain, agreeing to withdraw the suit and to remain in possession as a Tikadar. This ekrar was filed by Roop Narain, but not carried out by Oojhar, with whom Roop Narain subsequently colluded and allowed the case to go on to a decree.

We have nothing but assertion in support of the facts contained in this statement, and even if the decree of 1851 were reversed, there still remains the lease of 1847, which cannot be called in question after the lapse of so many years. The appellant's pleader urges that a petition for attachment was filed on February 1840 by Bhugwan Dutt; and on 5th June following application was made, praying that Mouzah Bhedas might be sold in execution; and on the following day, an order was passed that the property might be attached, and the Collector reported on 23rd August 1847 that the property might be sold; but the Principal Sudder Ameen distinctly finds, and nothing has been brought to our notice to show that he is wrong, that on 19th December 1843 the Mouzah Bhedas comprised in this pottah was excluded from the application of attachment filed by Bhugwan Dutt, the decree-holder, and we see that it was not put up to sale when the rest of the property was sold in execution of his decree. As, therefore, no attachment of this property had taken place, there was no bar to a lease being given; and as it has remained uncontested for more than 12 years, and we see no fraud in the transaction, we think that a suit to set it aside cannot now be brought. We, therefore, affirm the decision of the Lower Court on this.

Regarding Bishunpore Santo, we concur with the judgment of the Lower Court. It is alleged that this village is a Dakhilee of Mouzah Bhedas, and was attached along with it, but no proof whatever of this allegation is produced.

On Muddun Mohun's appeal, therefore, we give a decree for Mouzah Khagurya with costs in proportion, reversing the judgment of the Lower Court, and we confirm that judgment in regard to Mouzah Aboona Tal-Bhedas and Bishunpore Santo, and dismiss the appeal with proportionate costs.

With reference to the appeals Nos. 67, 68, 69, and 70, and the further appeal verbally made on the part of one of the defendants in the matter of costs, we see no grounds for interfering with the decision passed by the Principal Sudder Ameen, and dismiss all these appeals with costs.

The 27th January 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Limitation — Butwarah proceedings under Section 20 Regulation XIX of 1814 (Effect of)—Act XIII of 1848 — Possessory action — Cause of action (to auction-purchaser)—Amanut lands (History of).

Case No. 195 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 21st January 1863.

Baboo Hurree Mohun Thakoor (Defendant) *Appellant,*

versus

Mr. David Andrews (Plaintiff) *Respondent.*

Baboo Unnoda Pershad Banerjee and *Moonshee Ameer Ali* for Appellant.

Mr. R. T. Allan and *Baboo Kishen Kishore Ghose* for Respondents.

Suit laid at Rs. 8,518-8-4.

Butwarrah proceedings under Section 20 Regulation XIX of 1814 are only final as to lands which are the subject of partition.

In order to apply the provisions of Act XIII of 1848 in regard to limitation, it must be shown that there was an award, *i. e.* an adjudication after a contention between the parties before the survey authorities.

Under the general law of limitation, the cause of action in a suit for possession by an auction-purchaser at a sale for arrears of revenue arises from the date of purchase.

History of the Amanut lands given.

Bayley, J.—This appeal is against the whole decision of the Court below.

The plaintiff, Mr. D. Andrews, sued in the Court below as purchaser at a sale for arrears of revenue, for possession of 792*b.*8*c.*14*d.* which he claims as included in Mouzah Neemgachee Khoord in part of his purchase; and for mesne profits from 25th July 1850, the date of his purchase. Plaintiff based his title on the village survey maps of Mouzah Neemgachee Khoord, and the Collector's proceedings of the 31st May 1851, and the Tahood Milani papers of 1213 B. S.

Defendant, Hurree Mohun Thakoor, claimed the land as of Mouzah Doorail, part of the *Amanut* Mehal sold at a sale for arrears of revenue on the 29th May 1832 to his father. Defendant supports his pleas by reference to

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the amulnamah of the Collector to the previous proprietor dated 16th September 1814, and to the Butwarah proceedings of the Collector, dated 19th April 1854, by which last 516 beegahs were ordered to be taken out (kharij) from Neemgachee Khoord as being land of Hurria Dongah in defendant's Mouzah Doorail. It is added by defendant that, although in 1848 the survey authorities demarcated 792 beegahs really belonging to defendant's Mouzah "Doorail" to Neemgachee Khoord, still such survey map could be of no avail, as it was virtually set aside by the above Butwarah proceedings of the 19th April 1854, and which under Section 20 of the Butwarah Law (Regulation XIX of 1814) is final and conclusive. Limitation is also pleaded against plaintiff's claim under Section 14 Regulation III of 1793, and Act XIII of 1848. It is also urged that plaintiff, in his very plaint praying for possession, shews thereby that the effect of the survey proceedings was not to give possession to him; and that as defendant has possession under the Butwarah proceeding before referred to, plaintiff must shew a superior title before he can disturb him, defendant. In his pleading, defendant states the disputed land is *a portion of* 2,017 *beegahs* in the area of "Doorail."

Defendant, Rajdoolub Doss, farmer under Huree Mohun Thakoor, supported the pleadings of the latter, and equally contested the plaintiff's claim upon very much the same grounds.

Upon these pleadings, and on the evidence adduced in support of them by either party, the Principal Sudder Ameen, after deciding the point of limitation in favor of plaintiff, put as issues for the trial on the merits, whether plaintiff's title was superior or defendant's who further had possession, whether there had been any dispossession, and, if so, what amount of mesne profits should be awarded?

The decision of the Principal Sudder Ameen in regard to the matter of title and possession was also in favor of plaintiff.

Defendant now appeals to this Court, and upon the matter of limitation takes three pleas:—

I. That under Section 20 Regulation XIX of 1814, the order of the Collector in the Butwarrah proceeding of the 19th April 1854 was final.

II. That the survey award was made in 1848, and this suit not brought till 1861, 30th December, and thus the suit is barred under Act XIII of 1848.

III. That the adverse possession of defendant has been for more than 12 years before suit.

Upon the merits, defendant's appeal is very much upon the grounds before given, as those upon which he puts his case below.

Judgment.

Limitation cannot, in our opinion, bar this suit under Section 20 Regulation XIX of 1814.

The terms of that Section are that "the "determination of the Board of Revenue, "or Board of Commissioners *on the paper* "*of partition* shall be final," that is, shall be final in respect to those lands which are the subject of such paper of partition. Now, the land for which plaintiff sues, it is admitted, never was subject to partition. Limitation, therefore, cannot bar him upon this plea.

Nor can it do so under the provisions of Act XIII of 1848, for, in order to apply the provisions of that law in regard to limitation, it must be shewn that there was an *award*, *i. e.*, an adjudication after a contention between the parties before the survey authorities. Such an adjudication or award, it is stated by both parties, never took place in this case.

Neither does the general Law of Limitation bar plaintiff, because his cause of action arose to him at his purchase at a sale for arrears of Government Revenue on the 25th July 1850, and this suit was brought on the 30th December 1861, *i. e.*, within 12 years.

Upon the merits, we think that the decision in plaintiff's favor is correct. The plaintiff, it is proved and admitted, bought Kismut Neemgachee, consisting of six villages. Neemgachee Khoord is shown by the *Tahood Milani papers of* 1213 *B. S.*, *to have been one of the villages of Kismut Neemgachee* which plaintiff purchased. The plaintiff then shows that the land in dispute has been surveyed by the Revenue Survey Authorities as part of Mouzah Neemgachee Khoord in 1848. This he shows from the Mouzawaree Register Map, a document which, as its name and contents shew, contains a scientific topographical survey of each village separately.

These documents are, in our opinion, such sufficient proof of title on the part of a stranger, an auction-purchaser at a sale for arrears of revenue, who could not ordinarily command any other documentary title, to require defendant to rebut it by some

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better proof. On this part of the case, it is, in the first place, very much pressed upon us that the Butwarrah proceedings of the Collector of the 19th April 1854 set aside the proceedings of the Survey Authorities of 1848, but we do not think this is so. The Butwarrah proceeding could only adjust the area which should pay a certain assessment under the allotment made to each co-parcener. Such proceedings could not give a conclusive title in a suit for lands other than those subject to Butwarrah.

To proceed to defendant's case :—He clearly pleads that the lanes are of Doorail; that what he purchased in Doorail was of two parcels, *viz.*, 820 beegahs in Thannah Singrampore, and 1,197 in Thannah Oorda Nullah. 2,017 beegahs as shewn by the amulnamah of September 1814. Now the map of defendant's Doorail, taken also from the same Mouzawaree Register of the Survey Authorities, shews Doorail to consist of beegahs 3,010-4-6. The pleader urges that other villages are included in this area, and from a note in the map it appears that within the circuit of the village, No. 140, are included lands of 139, 141, 142, 143. But both maps clearly shew that another contention of appellant's pleader to the effect that other villages are included in the Mowzawaree map of Neemgachee Khoord is incorrect, because both maps shew that village to be quite distinct and not to have others in its circuit, and also shew that it was not included in the Nos. above referred to as in the circuit of "Doorail." Further, the pergunnah map shews that the villages named in the written statement of defendant, Huree Mohun, are not as the pleader suggests mapped as part of Doorail, or are part of Doorail, but are quite separate.

The history of the Amanut lands seems to have been this. The Government purchased large tracts of uncultivated land extending through various thannahs. These lands were to be given in jaghire to invalid soldiers according to their rank. Certain portions of these lands were distributed and settled with soldiers who had to pay a small jumma to Government, and a rent-roll of these jaghirs was made. But a great quantity of this land was never given in jaghir, and remained in the Collector's hands and under his management, and was known as the "*Amanut*" land, and was called *after the thannah* in which it was situated—Amanut lands of Thannah *Oorda Nullah*, Amanut lands of Thannah *Singrampore*, and so on. These lands used to be let for terms of years, but at last Government discontinued the jaghir system, and ordered the Amanut lands to be sold, and this was done as the leases expired. The Amanut lands comprised not only the lands which were never distributed, but also lapsed jaghirs. Some of the Government measurement chittas would ordinarily be in existence of each area so sold, and these would be the strongest proof in favor of defendant. The Government purchases comprised only parts of villages, for they purchased only *uncultivated* land, so that the cultivated area of the village remained with the zemindars. This Doorail might have an area of 3.010 beegahs of which 2,017 were sold by Government, and the rest remained with either Government or the zemindar, and this result would not then be so much against defendant as might otherwise be supposed.

Thus, from the Government records, the defendant could bring some proof beyond the amulnamah, but he does not do so; nor is the plaintiff's sufficiently strong *primâ facie* case met by any rebutting proof on the part of the defendant. Indeed, nothing is filed except the Butwarrah Ameens's Report on which the proceedings of the 19th April 1854 rest. Thus we see no sufficient ground to interfere with the decision of the Court below, and reject this appeal with costs accordingly.

The 27th January 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Mahomedan Law—Divorce (when irreversible).

Case No. 1062 of 1863.

Special Appeal from a decision passed by Baboo Jugobundhoo Banerjee, Principal Sudder Ameen of Tipperah, dated the 21st January 1863, reversing a decision passed by Baboo Greesh Chunder Banerjee, Officiating Moonsiff of that District, dated the 27th March 1862.

Syud Mozuffur Ali (Plaintiff) *Appellant,*

versus

Musst. Kumurunissa Bibee and others (Defendants) *Respondents.*

Baboo Kalee Mohun Doss for Appellant.

Baboos Hem Chunder Banerjee and *Chunder Madhub Ghose* for Respondents.

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According to Mahomedan Law, a divorce is irreversible if the husband does not take back the wife at any time before the *Edit*, or the period of a woman's probation.

Kemp, J.—THE plaintiff sues for restitution of conjugal rights, valuing his suit at Rs. 32.

The wife avers that she has been divorced by her husband that, while under his protection, he ill-treated her, and further that he has brought this suit because she refuses to give up her claim to certain properties which had been settled upon her in lieu of dower.

The Lower Appellate Court, finding that the defendant, the wife, had proved her plea of divorce, and that the plaintiff's conduct towards her had been bad, dismissed the suit.

In appeal it is contended that the divorce is not an irreversible one according to the principles of the Mahomedan Law, inasmuch as it was not pronounced three times at intervals of a month.

The Lower Appellate Court having found the fact of the divorce to be established, we have only to consider whether the form of the divorce is legal and sufficient.

The pleader for the appellant has drawn our attention to page 59 of Macnaghten's Principles of Mahomedan Law, in which the following passage occurs :—

"A husband may divorce his wife without "any misbehaviour on her part or without "assigning any cause ; but before the di-"vorce becomes irreversible according to the "more approved doctrine, it must be repeat-"ed three times, and between each time the "period one month must have intervened ; "and in the meantime he may take her "back either in an express or implied "manner."

The pleader contends that, as there is nothing to show that the husband repeated the divorce three times, he is entitled to recover his wife.

After consulting the Hedaya, we are of opinion that the divorce in this instance was Tâlâk Rijai, or reversible divorce, that is to say, that it was such a divorce as left it in the husband's power lawfully to take back his wife at any time within three months, which is the period prescribed by Mahomedan Law for a woman's probation, and which period is termed the "Edit," and consists of three terms of her courses.

The existence of the "Edit" is a condition of the right of the husband to return to, and receive back, his wife after divorce; but after the period of "Edit" has passed, the marriage is null and void.

The reason why the effect of the sentence of reversible divorce is postponed to the accomplishment of the "Edit," is the possible intention or wish of the husband to take back his wife ; but where he does not do so before the "Edit" is accomplished, the sentence of divorce takes effect from the instant it was pronounced.

The period alluded to in the passage quoted by the pleader for the appellant is the period of the "Edit." If a husband divorces his wife three times during that period which extends over three months, the divorce is irreversible ; but if, as in the present instance, one sentence of divorce be pronounced, the husband might take the wife back at any time before the expiration of her "Edit" or term of probation; but after that term has passed without the husband exercising the power of Rijaât, or returning to his divorced wife, the marriage no longer remains.

As it is clear that the husband in this instance did divorce his wife, and that he did not take her back at any time before the expiration of the "Edit," his claim to recover the person of his wife must be dismissed.

The appeal is dismissed with costs and interest.

The 28th January 1864.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Evidence—Service of Summons—Admission.

Case No. 210 of 1863.

Regular Appeal from a decision passed by the Judge of Hooghly, dated the 26th January 1863.

Soogundamoyee Debea (Plaintiff) *Appellant,*

versus

Azeemood leen and others (Defendants) *Respondents.*

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Moulvie Ahmed Ali for Appellant.

No one for Respondents.

The witnesses present at the service of a summons cannot be termed *secondary*, but are *the best*, evidence of the service of summons.

Failure to prove service of summons on the defendants who did not appear, is no reason for dismissing the suit as against the defendant who appeared and admitted the plaintiff's claim.

Jackson, J.—THE plaintiff sued to assess beegahs 213-5-13 which she alleged that the defendant held rent-free on an invalid title.

One defendant appeared and admitted that the portion of land in his possession, *viz.* beegahs 8-12-4 was not rent-free but rent-paying.

The other defendants did not appear.

The Judge, however, dismissed the suit, because the plaintiff did not prove the service of summons on the remaining defendants. The Judge states that the plaintiff's vakeel wished to examine witnesses who were present at the service of the summons; but as these witnesses were neither the Court peadahs, nor the witnesses who wrote and attested the receipt of service, he considered them to be secondary evidence which he held could not be admitted.

On appeal the Judge's decision on this point is taken exception to before us, and we have allowed the point to be argued, although not in the grounds of appeal.

The witnesses who were present at the service of the summons cannot be termed secondary evidence of the service of summons. They are the best evidence. The Judge was bound to examine them. He might also have called for further evidence if he thought necessary; but he was wrong to refuse to take the evidence of eye-witnesses, and to dismiss the suit, because the plaintiff had not produced the best evidence, and because the peadahs and attesting witnesses of the return were not present to depose.

As regards the defendant who appeared, we would also remark that an admission made by a defendant in Court is no proof that plaintiff had no cause of action as against that defendant. The plaintiff would still be entitled to a decree as against that defendant if he could show that he had good ground for bringing his action.

The decision of the Judge must be reversed, and the case remanded, in order that the Judge may direct the issue of a fresh summons on the defendants; and afterwards decide the whole case on its merits.

The 28th January 1864.

Present:

The Hon'ble G. Campbell, *Judge.*

Limitation—Sale by Hindoo Widow—Privity.

Case No. 483 of 1863.

Application for review of judgment passed by Justices F. B. Kemp and G. Campbell on the 22nd June 1863 *in Special Appeal No.* 85 *of* 1860.

Mussamut Gouree Debea, *Petitioner,*

versus

Rajah Annundnath Roy, *Opposite Party.*

Mr. R. V. Doyne and *Baboo Gopal Lal Mitter* for Petitioner.

No one for Opposite Party.

The doctrine of privity does not arise in questions o limitation.

In the case of a sale by a Hindoo widow which takes away both her rights and the rights of all those who claim under her, limitation runs from the date of sale.

MR. DOYNE presses this application on the ground that there was no privity between the widow as life-tenant, and the adopted son as reversioner, and that the reversioner not being affected by the laches of the widow, and not being himself in a position to sue, the limitation could not run

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against him during the widow's incumbency. But I do not find that this doctrine of privity arises in questions of limitation. Limitation runs absolutely from the time when the cause of action arises, save in regard to certain distinctly specified exceptions, of which the case of a son not born or not adopted is not one. Ordinarily, as respects the regularity of a sale, the time would run against all parties claiming an interest in the property. Under the new law the exceptions are specially defined. Under the old law the exception was, to a certain extent, left to the discretion of the Court, and even minority was not then in all cases a sufficient ground of exception. In the present case I do not think that there was any sufficient ground for allowing a discretionary exception. It may happen in the case of an alienation by a widow good for her life-time, that the cause of action does not arise till her death; but in the case of a sale which takes away both her rights and the rights of all those claiming under her, the limitation runs from the date of sale. I reject the application.

The 29th January 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Procedure (Suits partially decided before Act VIII of 1859).

Case No. 209 of 1863.

Regular Appeal from a decision passed by the Judge of Shahabad, dated the 13th January 1863.

Captain Parrott (Plaintiff) *Appellant,*

versus

Ram Suhay Singh (Defendant) *Respondent.*

Baboo Dwarkanath Mitter for Appellant.

Baboos Khetturnath Bose, Unnoda Pershad Banerjee, Mohesh Chunder Chowdhry, and *Hem Chunder Banerjee* for Respondent.

Suit laid at Rupees 13,847-13-9.

A suit must be held to be pending under Section 387 Act VIII of 1859, if anything remained to be done which might have been done under the old law; and a party in such a case is entitled to ask the Court to proceed under the old law, inasmuch as the application of the new Code would deprive him of a right, in reference to the procedure of the case, which, but for the passing of the Code, would have belonged to him.

Bayley, J.—In this case the plaintiff, Captain Parrott, of the Buxar Stud, on the 30th of January 1862, sued three brothers, defendants, for Rs. 13,874-13-9, and sought to bring certain property to sale in execution of a decree against one of the defendants, Thakoor Pershad (No. 3), which property had been adjudged in the summary department to be the property of defendants Nos. 1 and 2, and consequently not liable for the judgment-debts of defendant No. 3.

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As to limitation, appellant contends that the petition for execution was filed before Act VIII of 1859 came into force, *viz.*, on the 6th February 1858; that the decree against the defendant No. 3 was given on the 9th January 1856; that the first admission of the claim of the other defendant No. 1 was on the 7th May 1859; that there was an appeal from this on the 26th May 1859; that the case was on such appeal remanded on the 22nd July 1859, and, after remand, re-decided in favor of defendant No. 1 on the 9th January 1860; that plaintiff again appealed, but the appeal was rejected on the 20th February 1861, on the ground that, under Act VIII of 1859, no appeal could lie. The pleader urges that there was no authority in the Court to apply the procedure of Act VIII of 1859 retrospectively; that, under the old law, he had the right of appeal; that his suit was a pending suit under the old law; that the Judge misapplied Section 246 Act VIII of 1859, for that Section by its terms is applicable only to orders passed under Act VIII of 1859, whereas the orders allowing the claim of defendant No. 1

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were passed under the previous law, *viz.*, on the 26th May 1859; that the illegal order of the 20th February 1861 gave plaintiff his cause of action, and he brought his action on the 30th January 1862, *i. e.* within one year of his cause of action.

We are of opinion that this argument is valid, and the respondents have failed to show the contrary. This view, too, is in accordance with the decision of the majority of the late Sudder Court in the cases of Joy Kishen Mookerjee *versus* Shib Chunder Banerjee, S. D. A. Rep. 1859, p. 1521, and of the Maharajah of Burdwan *versus* Nuddea Chand Pattro, *ib.* 1860, p. 395, where it was ruled that a suit must be held to be pending under Section 387 of Act VIII of 1859, if anything remained to be done which might have been done under the old law; and that a party, in such a case, was entitled to ask the Court to proceed under the old law, inasmuch as the application of the new Code would deprive him of a right, in reference to the procedure of the case, which, but for the passing of the Code, would have belonged to him. Differing, therefore, from the Judge on this matter, we reverse his decision on this point.

(The rest of the judgment which was on the merits is omitted.)

The 29th January 1864.

Present:

The Hon'ble Walter Morgan and Shumbhoonath Pundit, *Judges.*

Mortgage—Irregularity—Waivor.

Case No. 1239 of 1863.

Special Appeal from a decision passed by Mr. E. F. Lautour, Judge of Patna, dated the 28th January 1863, reversing a decision passed by Moulvie Enamool Huq, Moonsiff of that District, dated the 13th November 1862.

Saligram Tewaree (Plaintiff) *Appellant,*

versus

Beharee Misser (Defendant) *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Annund Gopal Paulit for Respondent.

The omission of the Court to send with a notice of foreclosure a copy of the mortgagee's petition, as required by Section 8 Regulation XVII of 1806, was held to be not such an irregularity as made void the foreclosure, in a case where, subsequent to the issue of the notice, the mortgagor continued to live in the neighbourhood of the property, and the mortgagee erected buildings on it and used it as his own without objection or claim on the part of the mortgagor.

Morgan, J.—The mortgagor now sues to redeem the mortgaged property (many years after foreclosure proceedings) on the ground of error in those proceedings. It is certain that notice of foreclosure was duly issued to him, and that all the subsequent proceedings were regular; but the Court omitted to send with the notice a copy of the mortgagee's petition as required by Section 8 Regulation XVII of 1806. This omission on the part of the Court is now relied on by the plaintiff as making void the foreclosure. The Lower Court finds that, since the 16th March 1844, when the notice issued, the mortgagor has continued to live in the neighbourhood of the property, and that the mortgagee has erected buildings on it, and used it as his own without objection or claim made by the mortgagor. The irregularity relied on, whatever effect might have been given to it at or soon after the time when it occurred, has long since been waived by the plaintiff's conduct, and we agree with the Court below in holding that it cannot now avail the plaintiff. We confirm the decree of dismissal, and dismiss this special appeal with costs.

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The 30th January 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Onus probandi—Sale by Guardian of Minor.

Case No. 832 of 1863.

Special Appeal from a decision passed by Baboo Tara Kant Bidyasagur, Principal Sudder Ameen of Behar, dated the 26th January 1863, *affirming a decision passed by the Sudder Ameen of that District, dated the* 30*th January* 1862.

Achunth Singh and others (Defendants) *Appellants,*

versus

Kishen Pershad Singh and others (Plaintiffs) *Respondents.*

Mr. C. Gregory and *Baboo Greesh Chunder Ghose* for Appellants.

Baboos Kishen Succa Mookerjee and *Dwarkanauth Mitter* for Respondents.

In a suit by three brothers to recover an estate sold by their two elder brothers as their guardians during their minority, without any necessity and in collusion with the purchaser,—HELD that the *onus* was on the plaintiffs to prove that the sale was fraudulent and collusive.

Jackson, J.—THIS was a suit brought by three sons of one Gunga Dutt, on the allegation that their two elder brothers had, as their guardians during their minority, sold in the year 1248 Mouzah Nursingpore, their late father's landed estate, without any necessity and in collusion with the purchaser. They, accordingly, sued their brothers and the purchaser to recover the estate.

The brothers did not appear in the action.

The purchaser denied collusion, and alleged that the sale to him had been made with the view of paying off the plaintiff's father's debts.

The first Court found that plaintiffs were minors at the date of sale, and that the purchaser defendant had not sufficiently proved the necessity for the sale, and decreed the suit.

The Lower Appellate Court took the same view of the case. It threw upon defendant the whole *onus* of proof that the plaintiffs' brothers were obliged to sell the estate. The defendant stated that he was unable to produce documentary evidence regarding the debt of plaintiffs' father, because the deed of sale and other documents connected with it had been destroyed in the Arrah Judge's Court during the mutinies. The Lower Court admitted this to be a good reason for defendant not producing direct documentary evidence on the point, but still thought that defendant might, if his story had been true, have produced some document in support of his assertion, and refused to credit his statements on oral evidence alone. It confirmed the decree of the first Court.

On special appeal it is contended, *first*, that the *onus* of proof of the alleged fraud and collusion was in the first instance on the plaintiffs, and that the Lower Courts had wrongly thrown the whole *onus* of proof on the defendant; and *secondly*, that, in the peculiar circumstance alleged by defendant, his oral evidence was worthy of credit, even though not supported by documentary evidence.

We think that the plaintiffs were bound to shew that there was some *primâ facie* ground for at least suspicion that the transaction between defendant and their guardians was collusive and fraudulent. They have not attempted to give any such evidence. In such a case it was hardly necessary to call on defendant for his evidence. But he has shewn that the purchase made by him was at the time openly put forward in the Courts, and he has produced the person to whom the purchase-money was paid, the debtor of the plaintiff's father who has given evidence to the debt. Such evidence is, we think, good in the absence of all evidence on the side of the plaintiff.

We reverse the Lower Court's decision, and remand the case with directions that the Lower Court will first call upon the plaintiffs to give evidence that the purchase of defendant was collusive and fraudulent. If such proof is given, the Court will then consider defendant's evidence on the point that the transaction was honest, and decide on the merits.

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The 30th January 1864.

Present:

The Hon'ble H. T. Raikes and W. S. Seton-Karr, *Judges.*

Limitation—Survey Award.

Case No. 244 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 6th September 1862.

Jankeeram Mohunt (Plaintiff) *Appellant,*

versus

Aradhun Banerjee and others (Defendants) *Respondents.*

Mr. J. Cochrane and *Baboo Banee Madhub Banerjee* for Appellant.

Baboo Dwarkanath Mitter for Respondents.

Suit laid at Rupees 9,942-3.

A suit substantially to vary the boundaries laid down in a survey award, must be brought within three years from the date of the award.

Seton-Karr, J.—This is an appeal against an order of the Principal Sudder Ameen dismissing the plaintiff's suit on the grounds of limitation. The Lower Court holds that the action is one, substantially, to vary the boundaries laid down by the survey department on the 28th of February 1854, and that, not having been brought within three years from that date, the suit is not tenable.

We find that, in December 1861, the Deputy Magistrate, as the parties before us were at issue, brought the dispute under Act IV of 1840, and, referring to a previous decision of the Civil Court, held that the plaintiff appeared to have some claim to the lands sued for, but, not having been able to adduce proofs of possession thereof for some considerable time previous to the dispute, could not be maintained in possession as he claimed to be.

We find, further, on reference to those proceedings of the Civil Court, which are relied on by both parties that, in a suit quoted as suit No. 10, the Maharajah of Burdwan claimed a large portion of lands in this very locality, and the Court, after hearing the ancestors of the present litigants, who were admitted to the suit, gave the Maharajah a decree for a portion of his claim, but intimated that, out of an area of 1,009 beegahs, which the representative of the present appellant claimed as rent-free lands, he, the appellant now before us, was only entitled to 456 beegahs, the remainder belonging to the present respondent, or as the Court also put the case on the claim of the present respondent to 1,109 beegahs out of the Maharajah's claim, it ruled that of those 1,109 beegahs claimed by the respondent, the present appellant was entitled to 456 beegahs, and the Maharajah to the rest.

In either view the Civil Court thought that the present appellant could get 456 beegahs and no more. When the survey award was delivered in 1854, the Revenue Officers appear to have followed the intent of the Civil Court, and to have demarcated the plaintiff's land of 456 beegahs, but as within the Mouzah of Sonamookhee.

This being the case, the plaintiff now seeks to recover, not 456 beegahs, but 1,418 beegahs of land which he maintains are the lands alluded to in the former decree of the Civil Court as his rent-free lands, and he seeks to recover, them not as within Sonamookhee, but as part of Turuf Gongonee.

Now, on the above statement of facts, we are clear that the Lower Court is quite right in holding that the plaintiff cannot be suffered, after the expiry of three years, to alter the demarcation of the survey which included these lands in Mouzah Sonamookhee. For, were the plaintiff to sue and be successful, a decree, in conformity with his plaint and form of action, would unquestionably alter the survey boundaries, and would be a direct contravention of Act XIII of 1848, as the decree would be gained in a suit between the same parties, but not brought within three years from the survey award itself.

Whatever rights the plaintiff may have to 456 beegahs of land, as intimated by the Civil Court in Sonamookhee, we do not interfere with, nor do we intend to point out to him the means which he may or ought to take for asserting his rights thereto as a portion of Sonamookhee. But it is quite certain that such rights, as a part of Sonamookhee, cannot be heard and determined in a suit in which the claim is for lands in Gongonee. In this view we are satisfied of the correctness of the Lower Court's decision in law, and we uphold his judgment, and dismiss this appeal with costs.

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The 2nd February 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Minors — Guardians — Family Custom—Hindoo Law of Inheritance—Ghatwalee tenures (Succession to —by females).

Regular Appeals from a decision passed by the Judge of Beerbhoom, dated the 24th December 1862.

Case No. 171 of 1863.

Mussamut Kustoora Koomaree (Defendant) *Appellant,*

versus

Monohur Deo (Plaintiff) and others (Defendants) *Respondents.*

Baboos Unnoda Pershad Banerjee, Dwarkanauth Mitter, Khetturnauth Bose, and *Kedarnath Chatterjee* for Appellant.

Mr. R. T. Allan for Respondents.

Suit laid at rupees 2,34,513-12.

Case No. 234 of 1863.

The Government (Defendant) *Appellant,*

versus

Monohur Deo (Plaintiff) *Respondent.*

Baboo Kishen Kishore Ghose for Appellant.

Mr. R. T. Allen for Respondent.

Suit laid at rupees 2,34,513-12.

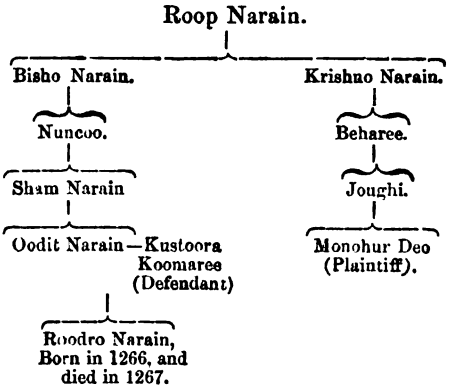
A female, whose estate is under the management of the Court of Wards, cannot, without the consent of the Court of Wards, give up her rights in favor of the next heir.

Custom, where it is ancient, invariable, and established by clear and positive proof, over-rides the usual law of inheritance.

Succession to Ghatwalees is regulated by no rule of koolachar or family custom, nor by the Mitakshara Law, but solely by the nature of the Ghatwalee tenure, which descends undivided to the party who succeeds to, and holds, the tenure as Ghatwal. A female is not incapable of holding a Ghatwalee tenure.

Loch, J.—THIS was a suit to obtain possession of the Ghatwalee Mehal Rohinee, on the allegation that plaintiff, as nearest male heir, was entitled to succeed in preference to a female, the mother of the last incumbent, on the ground, 1*st*, according to the custom of the family, the koolachar ; 2*nd*, according to the Mitakshara Law ; and 3*rd*, because a female was incompetent to undertake the duties required of a person holding the tenure.

The following genealogical table shews the position of the contending parties :—



Kustoora Koomaree is the widow of Oodit Narain, who died in 1266 B. S., leaving his wife pregnant. She gave birth to a son, Roodro Narain, in Cheyt 1266, and he died on 17th Pous 1267 B. S. The mehal was under charge of the Court of Wards previous to the death of Oodit Narain, as he was fatuous and incapable of managing the property, and it has remained under that charge up to the present time.

During the course of the litigation, Kustoora Koomaree filed a petition on 20th November 1862, admitting, as it is alleged, the right of the plaintiff to succeed ; and the Judge, taking this into consideration with the other evidence, which, in his opinion, goes to establish the family custom, gave a decree for the plaintiff with mesne profits to be determined hereafter.

Two appeals have been preferred from this decision, one by Kustoora herself, notwithstanding her petition waiving her claim ; and the other by the Court of Wards, as manager of the property.

A preliminary objection to hearing these appeals was taken by the pleader for the respondent Monohur Deo, which we must first dispose of. It is urged that Kustoora has waived her claim ; that the Judge, as shewn in his decision, took special pains to ascertain that the presentation of the petition was her own free act, and, being satisfied of this, he considered it to be binding upon her, and, therefore, she was not in a position to appeal, and, such being the case, the Court of Wards, acting through and for her, had no standing, as she had given up her rights.

We find that this estate was taken charge of by the Court of Wards under the provisions of Regulation X of 1793, and, being

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now the property of a female, the Court of Wards is empowered to retain the management so long as it sees fit. Under the provisions of Section 3 Regulation L of 1793, the Court can, at its discretion, invest female proprietors with the management of their own estates, if fully satisfied that they are competent to the charge. Now the fact that this property is retained up to the present time under charge of the Court of Wards clearly indicates that the Court does not consider Kustoora competent to manage the estate. While, therefore, it remains under the charge of the Court, she is incompetent to do anything as regards the management. Now, with respect to management, the power of the Court of Wards is not of that limited character which appertains to the office of manager appointed under the provisions of Section 6 Regulation X of 1793, as the respondent's pleader wishes us to believe, but it has far more extended powers. The Court sues and is sued on the part of the ward; it has the disposal of the monies collected from the estate, and not required for the ward's maintenance; and it can restrain the ward in doing anything to the injury of the estate. In fact, everything connected with the estate is done through its agency and with its sanction, and no act of the ward, in respect of that estate, is valid without the sanction of the Court. Were we to listen to the objection now taken, we should, in fact, be ousting the Court of Wards of its jurisdiction, which we have no intention of doing, for we hold that so long as a person is a ward, he can only sue and be sued through the Court, who are his guardians, and this guardianship continues in the case of a female so long as the Court sees fit to retain its charge. But it is said a female, not being a minor, may give up her rights in favor of the next heir, and, in that case, the jurisdiction of the Court of Wards ceases. But we think that she can do so, only with the consent of the Court of Wards, for, were it otherwise, she might, by so doing, effectually oust the Court; and there might be many reasons known to the Court, which might render such a transfer of rights unadvisable. We conclude, therefore, that a ward cannot act independently of the Court, and that all acts done by a ward, except as regards the expenditure of her allowance allowed to a female, without the consent of the Court of Wards, are invalid.

We now proceed to the points raised in appeal, taking first No. 234. The Judge considers that, by family custom, this property descends to the eldest son, to the exclusion of the other members of the family; and, on the failure of direct male heirs, it goes to the nearest male heir to the exclusion of all females. In support of his opinion, he cites sundry documents filed by the plaintiff, and the testimony of certain witnesses who prove that, in one instance in this Ghatwalee, a female was superseded by the next legal male heir; that a similar supercession took place in the Lakoorya Ghatwalee, the proprietors of which are connected by family with the Rohinee Ghatwals; that questions of inheritance are decided by the Mitakshara Law, while the Mithila and Bengal Laws are the standard in cases of marriage and other ceremonials. We proceed now to examine the documentary evidence. The first is a proceeding of the Beerbhoom Court, dated 17th June 1843, relative to a Ghatwalee called Sowah. This proceeding, if it is worth anything, is rather against than for the plaintiff, and it is difficult to see with what purpose it was filed, for it distinctly states that a lady, one Dhoroop Koomaree, succeeded her husband Golab Singh as Ghatwala, and held possession for many years, that, after her death, there was a dispute between the daughter's son of a co-wife, and the next legal heirs on the male side; and under the Bywustha of the Pundit, certificate was given to the former; and a regular suit brought to set aside that order, and to recover possession was dismissed. This proceeding, therefore, shews that females not only held possession, but that succession followed in the female line. It is urged that the Sowah Ghatwalee has been partitioned; and, in divided Ghatwalees, females may succeed, but not in undivided ones as Rohinee. This statement, however, is mere assumption, and rests on no foundation whatever, and it is difficult to understand how the fact of partition should have the effect of importing into a divided tenure an element which it had not in its integral state—that a female cannot inherit a whole, but she may a half, or anything less than the whole. Further, the Ghatwals of Sowah are of a different family and caste, and their customs are not binding on the plaintiff's family. For what purpose, then, it may be asked, did plaintiff file this document? He brings it to substantiate his claim; and finding it unsuited to his purpose, he now repudiates it altogether as setting forth a series of facts unsuited to his circumstances.

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A Bywustha of certain Deoghur Pundits, in a dispute for jujmani, is the next document quoted. This relates to a dispute between two females on the one side, and Tetoo Jah on the other, as to which had the right to succeed as puroheet to the deceased ; and the Pundits, to whom the case was referred for arbitration, held that, as there were certain ceremonies which no female could perform, the office could not be held by females. Now, whether the parties to this dispute were or were not members of the Rohinee family, is quite immaterial, for the award of the Pundit settles nothing as to the custom of the family in regard to the succession to landed property.

The plaintiff quotes the decision of the Sudder Court in the case of Monohur Singh appellant, dated the 20th November 1799, but the Court do not see how that decision helps the plaintiff's case at all. There can be no doubt that custom, where it is ancient, invariable, and established by clear and positive proof, does over-ride the usual law of inheritance as shewn in the decisions quoted by the Judge ; but as we propose to show hereafter, that proof is an element wanting in the present case.

We come next to a decision of the Principal Assistant to the Governor-General's Agent at Hazareebagh, dated 31st July 1845. This was a dispute regarding the succession to Ghat Gowas, Pergunnah Kurukdea, in Zillah Ramghur, then transferred to the Political Agency of Hazareebagh. The Principal Assistant wished to ascertain the usage in regard to succession prevailing in the Ghatwalee tenures of Kurukdea ; and after enquiry, he held that the Ghatwalee tenure descended exclusively to the male line, owing to the peculiar duties attached to the tenure ; that, in Pergunnahs Kurukdea, Palamow, and Gundah, and other zemindaries of the hill districts in the province of Behar, generally called Balaghat, no female ever succeeded ; and, he adds, the precedents which have been adduced in support of such succession (for that is clearly the meaning of the passage) relate to the Jungle Mehals of Zillah Maunbhoom and other places in Beerbhoom in the province of Bengal, which is quite different from that of the province of Behar. This decision, as correctly urged by the pleader for the appellant, tells nothing in favor of the plaintiff, but is really against him, for it shews that there is one course of succession in Behar, and another in Bengal ; that, though females do not succeed in Ramghur, they do in Maunbhoom and Beerbhoom, in which latter zillah Rohinee is situated. The Judge goes on to say that this decision was confirmed by the Sudder Court on 17th September 1859. This is hardly a correct account of the appeal referred to, for the merits of the decision were not gone into. A special appeal was preferred from the order of the Governor-General's Agent in the South-Western Frontier, admitting a review of judgment after time ; and this order was alone before this Court, and was reversed, the effect of the decision of this Court being, of course, to sustain the judgment of the Principal Assistant.

The next document referred to is a decision of the Principal Sudder Ameen of Monghyr, dated 22nd April 1852. As, however, this relates to a share of a mokururee tenure, under the terms of a written document, we think that it has no bearing in this case; nor is it shewn us that the parties concerned in that case are in any way connected with the family of Rohinee, or are guided by similar customs in matters of inheritance.

We come now to the petition of Kustoora Koomaree, in which she is said to have waived her claims and admitted the right of the plaintiff to succeed. The petition is far from being a distinct acknowledgment of the right of the plaintiff, and a simple admission of his better title. It is a contract with the plaintiff by which she agrees to give up the Ghatwalee to him, provided that he settles two of the five villages comprised in the Ghatwalee on her daughter, and gives other consideration.

The documents quoted above comprise the whole of the documentary evidence filed by the plaintiff; and we think it may be said, without danger of contradiction, that it, in no single point, sustains the plaintiff's assertion that there is "koolachar" or family custom in Rohinee, by which the nearest male succeeds to the exclusion of the female heir.

Now, as regards the oral evidence, it may be true so far as it goes, but it is insufficient to establish a koolachar or family custom properly so called. And it may be here stated that the oral evidence is of such a confused character that it is impossible to determine, with any certainty, by which of the schools of Hindoo Law inheritance in this family is regulated. There has been no break previous to the present instance in the succession from father to son, since the time of Roop Narain, the common ancestor of the contending parties four or five generations back. The witnesses speak of

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an instance previous to the time of Roop Narain, about 100 years ago, when one Sookdeb Ghatwal died leaving a widow, and he was succeeded in his office and estates by his brother Sohadeo, who was the father of Roop Narain. They mention another instance in the case of Ghat Lakoorya, in which Sheeb Deo died leaving a widow, and was succeeded by his brother Gunesh to the exclusion of the females. This latter instance is said to have occurred either 25 or 80 years ago, the witnesses not being very accurate as to the period of time which has elapsed since the event. The Lakoorya case is pressed upon our attention, because it is said that the families of Lakoorya and Rohinee are related, and the same customs prevail in both Ghatwalees. One or two other cases in other Ghats are mentioned by individual witnesses; but, beyond the fact that the tenure descended from father to son, and that in one instance, where the succession was broken by failure of the direct male line, a collateral male succeeded to the exclusion of the female heirs, we do not find that there is that clear and positive proof of an ancient and invariable usage which can alone establish "koolachar" properly so called. The succession of the eldest son, in room of his father to the exclusion of other sons, can be satisfactorily accounted for by the nature of the tenure, and the supercession of females from the same cause, without importing anything like a family custom into the case; for we think that succession to these Ghatwalees was regulated by no rule of koolachar, nor by the Mitakshara Law, but solely by the nature of the Ghatwalee tenure. These tenures, it must be remembered, were in existence in many parts of the country long before the accession of the present Government, and were grants of land made either by the authority or sanction of the Government, to certain persons as remuneration for their services as police. The head or sirdar of each of these police stations was required to keep up a certain number of men properly armed, to apprehend criminals, protect travellers, keep the peace, and to perform other police duties. They were liable to dismissal for misconduct or neglect, and any stranger might have been appointed in their room. Some of these grants were hereditary in their origin, and all very soon became so; and it being inconvenient and wholly subversive of the Ghatwalee system, to admit the element of Hindoo Law, which requires an equal division of the deceased father's property among his sons, the Ghatwalee tenure descended undivided to the eldest son, to the exclusion of the others, who either lived with, or were supported by, him, or followed their own pursuits. Had the inheritance been regulated by the Mitakshara, or any other system of Hindoo Law, the property would, in the first generation, have been divided among the sons of the first holder of the tenure, and sub-divided among their heirs. The party who succeeds to and holds the tenure as Ghatwal must be, and has always been, looked upon as sole proprietor thereof, and therefore the other members of the family cannot claim to be co-parceners and entitled to share in the profits of the property, though they may, by the permission and good will of the incumbent, derive their support either from some portion of the property which he may have assigned to them, or directly from himself. And, if it be so with the nearer members, the distant members of the same family cannot be considered as holding in common with the incumbent, so as to bar the widow or mother's right to succeed. Even, under the Mitakshara Law, the widow and mother would be entitled to succeed, if the property left by the deceased were not held in common; and we have stated above that we do not think the Ghatwalee tenure could ever be said, in the sense used in the Mitakshara, to be held in common.

It is also urged that a female cannot hold a Ghatwalee, because she is incapable of performing the duties attached to the tenure. This is an allegation which is contradicted by facts; for, in the list of Ghatwalee tenures produced in Court, we find the names of several females holding these properties, and the reported decisions of this Court also show that females have held and have been recognised as capable of holding these tenures. If personal service were indispensable, the objection might be of some weight; but, where the duties consist chiefly in acts of superintendence, where a principal object is the keeping up a sufficient body of armed men to protect the Ghats, and this duty is complied with to the satisfaction of Government, there can be no sufficient reason for depriving a female of the possession of the property, the ordinary duties of which she can do effectively through an agent. But there is another consideration which convinces us that a female can hold a Ghatwalee tenure. Regulation XXIX of 1814 provides that the Ghatwals, they and their descendants in perpetuity, shall be maintained in possession of the tenure so

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long as they respectively pay the jumma assessed upon them, and Section 5 provides for the disposal of these tenures by public sale, should the Ghatwals fail to pay their stipulated rents. Such sales are to be made in like manner and under the same rules as lands held immediately of Government. Now, in the event of a sale taking place, who is to prevent a female from purchasing the tenure; and if she purchased it, and was able to pay the stipulated rent, who could turn her out, or deprive her of the property, on the ground that she was a female and incapable of performing the duties connected with it?

We hold, therefore, that on none of the grounds urged by the plaintiff is he entitled to obtain possession, and we reverse the decision of the Lower Court and dismiss the suit, charging plaintiff with all costs and interest thereon from date of decision. No separate decree need be passed on the appeal of Kustoora Koomaree, for the decision in this case covers her appeal, for we have held above that, being a ward, she was incapable of suing or being sued except through the Court of Wards; and any acts done by her, in respect to the disposal or management of this property, without the sanction and approval of the Court of Wards, must be considered null and void. As a separate appeal on her part was unnecessary, we think that it will be just to make the parties in this second appeal pay their own costs, and we order accordingly.

The 2nd February 1864.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Limitation—Temporary possession under decree.

Case No. 284 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 25th February 1863.

Degumbery Dossee (Defendant) *Appellant,*

versus

Rajah Aanundnath Roy (Plaintiff) *Respondent.*

Baboos Dwarkanath Mitter and *Hem Chunder Banerjee* for Appellant.

Baboos Sreenath Doss and *Unnodapershaud Banerjee* for Respondent.

A brief possession for a few weeks under a decree subsequently set aside or modified so as not to have effect against the persons who were then in possession and to whom possession was restored, is not such a possession as entitles the plaintiff to calculate limitation from that time.

Morgan, J.—THE judgment of the Court below in this case must be reversed, the Court having come to an erroneous conclusion upon the first issue, the issue of limitation. The plaintiff has been out of possession of the property in dispute for a great number of years, and the mode in which he shows that this suit is brought within the time of limitation is this. There was litigation respecting the possession of the land now in dispute between him and the Audhikarees, which resulted in a decree in his favor, and in execution of that decree he was put into possession of the property, and remained in possession for a short time, a few weeks. But the decree in that suit in which the defendants (the appellants here) intervened was set aside or modified, so as to give it no effect against them; and the possession which was given to the plaintiff, in execution of the decree, was taken away from him and restored to the defendants in the present suit, who were found, in fact, to be the persons in possession at that time, and who have remained in possession ever since. A brief possession obtained by him, under such circumstances, is not such a possession as entitles the plaintiff to calculate limitation from that time. The truth is that, excluding the period within which legal proceedings were pending between him and the Auhikarees, and between him and the intervenor, there is a period far exceeding 12 years, during which he was out of possession. The defendants may not themselves have been in possession for the whole period. Whether they have or have not, it is not material for the purpose of the present issue to determine. The suit is barred, because the plaintiffs fail to show a right of suit in themselves within the time of limitation.

The decision of the Lower Court is reversed, and this appeal decreed with costs and interest.

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The 2nd February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Sale (by Moonsiff's Peshkar).

Case No 1575 of 1863.

Special Appeal from a decision passed by Baboo Greesh Chunder Ghose, Officiating Principal Sudder Ameen of Backergunge, dated the 12th December 1862, affirming a decision passed by Baboo Brojo Mohun Dutt, Moonsiff of that District, dated the 20th February 1861.

Omur Chunder Doss (Plaintiff) *Appellant,*

versus

Soormunnissa Khatoon and others (Defendants) *Respondents.*

Baboos Bungshee Dhur Sein and *Anund Chunder Ghossal* for Appellant.

Baboos Onookool Chunder Mookerjee and *Kalee Mohun Doss* for Respondents.

A sale conducted by a Peshkar, by direction of his Moonsiff who was indisposed, was upheld, no substantial injury being shown to have resulted.

Kemp, J.—THE Moonsiff, being indisposed, directed his Peshkar to conduct the sale. The special appellant has not shewn us that he sustained any substantial injury by this proceeding, which is in conformity with the rules then in force. *See* Rule 7 of the Circular Order of July 1846.

Appeal dismissed with costs and interest.

The 2nd February 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Written statements (Time for admission of).

Case No. 254 of 1863.

Regular Appeal from a decision passed by the Judge of Moorshedabad, dated the 12th February 1863.

Mirza Ali Nukee *alias* Mirza Emdad Ali (Plaintiff) *Appellant,*

versus

Mirza Torab Ali *alias* Mirza Nawab and others (Defendants) *Respondents.*

Mr. G. Gregory and *Moulvie Murhumut Hossein* for Appellant.

Baboos Chunder Madhub Ghose and *Obhoy Chunder Bose* for Respondents.

The admission of written statements of the parties on various dates, unless expressly called for by the Court, is contrary to the provisions of Sections 120 and 122 Act VIII of 1859.

* * * * * *

Loch, J.—WE observe that the Lower Court has in this case received the written statements of the parties on various dates, and thereby acted contrary to law. The written statement of the defendant Torab Ali was filed on 4th June 1862, that of the plaintiff on 4th July following, and it is of the nature of a reply taking up the allegations made by the defendant and answering them. The written statement of the Collector (who was made a defendant in the suit) was filed on 12th July 1862. The Judge must be aware that the admission of these two last statements, unless expressly called for by the Court, is contrary to the positive enactment of Sections 120 and 122 Act VIII of 1859, and his attention is drawn to the provisions of that law to which he is directed strictly to conform and to require a similar conformity on the part of all the judicial officers subordinate to him.

The 2nd February 1864.

Present:

The Hon'ble L. S. Jackson and Shumboonath Pundit, *Judges.*

Mortgage (Zur-i-peshgee)—Accounts—Suit.

Case No. 228 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 22nd January 1863.

Bibee Suyeedun (Plaintiff) *Appellant,*

versus

Syud Zuhoor Hossein and others (Defendants) *Respondents.*

Messrs. H. Stainforth and *John Baptist, Moonshee Ameer Ally,* and *Moulvy Murhumut Hossein* for Appellant.

Mr. A. F. Lingham, Baboos Dwarkanath Mitter, Unnodapershad Banerjee, and *Kally Kishen Sein,* and *Moulvy Aftabooddeen Mahomed* for Respondents.

Directions as to the nature of accounts to be taken in a suit for possession of property the subject of a zur-i-peshgee mortgage, and as to the form of suit in such a case.

Shumboonath Pundit, J.—PLAINTIFF on the 14th March 1861 brought this action at

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Monghyr to recover possession of certain portions of a zemindary mortgaged by her vendors to the ancestor of the Mahomedan defendants. The Hindoo defendants are plaintiff's vendors, made *pro-formâ* defendants in the case. Plaintiff states that she purchased the property in dispute from the mortgagors by a deed of sale dated 27th August 1860, and, as provided in the deed, offered Company's rupees 10,351-2-1-12 to the Mahomedan defendants as the principal of the zur-i-peshgee advance, but they refused to accept it, and to make over the property. She, therefore, sues for possession, and offers to pay the aforesaid sum assigned over to her for the said defendants by her vendors.

Plaintiff's vendors filed an answer denying the completion of the sale to her, and made allusions to the non-payment of certain bond debts and other sums. Muhboob Hossein defendant pleaded that his rights in the property had been sold in execution and purchased by Musst. Nathoo. Syud Zuhoor Hossein and Syud Torab Hossein, defendants, denied that plaintiff had ever offered the money as mentioned in her plaint; and urged that, under terms of the zur-i-peshgee lease, before the property could be released to the plaintiff, large sums of money were to be paid by her to them on account of advances to the ryots, and arrears of rent due from them, as well as on account of a large amount of revenue paid by them for the estate under a new settlement made by Government from 1247 over and above the former revenue, and a large sum of money on account of three bonds made payable along the zur-i-peshgee advance.

Bibee Nathoo, having been made a defendant, adopted the defence mentioned above, and defendant Bibee Baichun represented that her rights were made over to Zuhoor Hossein defendant. Plaintiff, in her written statement, denied the three bonds, charged collusion against her vendors, and pleaded that money claimed as arrears, &c. due from the ryots was not, as a question of fact, a right demand, and urged that *legally* the mortgagees were not entitled to demand any credit on the ground of payment of a greater sum as Government revenue than that payable at the time when the property was made over to them by her vendors.

Meanwhile, Zuhoor Hossein and others brought two separate actions for recovery of principal and interest of two out of the three bonds mentioned above against the present plaintiff and the Hindoo defendants of this case as the original debtors of the money borrowed under those bonds. In answer to the plaint in these bond cases, the vendors of the plaintiff denied the deeds, and said that they had been misled by their mortgagees to admit their liability to these debts in their answer to this case for possession instituted by the plaintiff.

These three cases were tried together, and the Principal Sudder Ameen, thinking that the two bonds were proved to have been executed, and that they were made payable along with the zur-i-peshgee advance, dismissed the case of the plaintiff, simply on the ground that she, not having offered to pay all that was payable to the mortgagees before the property could be redeemed, was not entitled to a decree.

Against this decision of the three cases, plaintiff has appealed to this Court. It is pleaded and admitted by Zuhoor Hossein and others by their vakeels here, and by their act of bringing separate actions for the two bonds, that their demand under the bonds were separate claims for money due to them personally from the original debtors, but for the payment of which the property sold to the present plaintiff was hypothecated. In such a case, clearly, these defendants had no right to detain the property mortgaged to them, on the ground of non-payment of the money due under these bonds.

With reference to this admission by these defendants, the Court tried the cases regarding those bonds separately. Though the Hindoo defendants, the original borrowers, had not appealed, as eventually the property purchased by the plaintiff might be sold under any decree given for these or any one of these two bonds, the present plaintiff was allowed to carry on her appeal in those bond cases, and attack the whole case of the plaintiff in these suits. By the decisions of this Court, dated 27th of January 1864, the appeal of this plaintiff in the case of one bond has been decreed and dismissed in another. Now non-payment of any money due under these bonds was no bar to the claim of the plaintiff; and, even if the money due under these bonds had been established to have become parts of the original zur-i-peshgee, it is certain that, when no allusion was made to them in the deed of sale to the plaintiff, she was clearly entitled to a decree in this case, though only on condition of paying the money due under these bonds along with the zur-i-peshgee offered to be paid. It was not proper to dismiss her suit, because she could not be aware of all the previous

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acts of his vendors, and had not, therefore, in her plaint offered to pay for bonds of which she knew nothing.

With reference to the Tuccavee and arrears due from the ryots claimed by Zuhoor Hossein and others, it is clear that, also for not offering to pay them, the plaintiffs' case cannot be dismissed, though it is evident that she can obtain only a decree, saddled with a condition to pay these debts due to the mortgagees under the terms of the deed of mortgage. The same remarks apply to the demand regarding the excess of Government revenue, connected with which item it is further necessary to decide, *first*, whether any such demand can legally be allowed to the mortgagee. Now the amount of the first demand, as well as many questions regarding the second item of demand, cannot satisfactorily be settled without examining an account of the gross proceeds of the property during the time that the mortgagees are in possession. It is also evident that, though such peshgee leases have been repeatedly decided to be usufructuary mortgages to which, notwithstanding the wording of deed or deeds connected with such transactions, the provisions of Sections 9 and 10 of Regulation XV of 1793 apply, yet, under the terms of the deed of sale to plaintiff, she is not entitled to claim any account from the mortgagees, with the view either to avoid payment of the whole or a part of the principal of the zur-i-peshgee advance, or to recover any mesne profits for herself. If anything has been calculated by the mortgagees beyond the principal and the 12 per cent. interest allowed to them by law, all that only the vendors of the plaintiff can claim to recover as mesne profits. It is also questionable whether, irrespective of the limited nature of the purchase made by the plaintiff, with reference to Section 10 Regulation XV of 1793, the Court can, in a mortgage lease like this, allow the mortgagees to recover and retain anything beyond that allowed by law. If plaintiff cannot demand an account, and if she cannot claim any surplus from the mortgagees, it might not be expedient to take an account in this case, unless the amount of the items to be allowed to the mortgagees cannot satisfactorily be ascertained otherwise.

This case, however, cannot be satisfactorily decided even as a case between the plaintiff and the mortgagees, without an account being taken of the gross collections of the estate. It is also clear that plaintiff is not entitled to recover the property until the whole of the money due to the mortgagees, under the deed of zur-i-peshgee, is paid to them, and if she be made to pay more than the amount assigned to her for the mortgage in her deed, she will have to bring a separate action hereafter against her vendors for money paid on their account. It is also clear that plaintiff cannot claim mesne profits which her vendors may claim hereafter. Further, it is not at all advisable that either the accounts of the whole estate for the whole period should be taken only for the adjudication and settlement of facts of comparatively minor importance, or, if it can be avoided, any possibility left for other suits being instituted.

All this difficulty, all this anomaly, may be avoided by compelling the vendors of the plaintiff to join with her as co-plaintiffs in the case, and to demand mesne profits and accounts. In such a case the whole matter can be fairly and more satisfactorily, legally, and equitably decided, and substantial justice done to all parties concerned.

Accounts of gross collection being asked and put in as required by law, and the amount of the gross produce of the estate being determined, the amount of money, if any due to the mortgagees, can be easily ascertained. If that is found to be less than the amount offered by the plaintiff to the defendants, they may be ordered to receive, out of the money assigned to the plaintiff, only that found to be due to them, and the rest of it she may be ordered to pay to her vendors. If more than the sum kept in deposit with the plaintiff is found due to the mortgagees, the decree may provide for the payment of the additional sum by the plaintiff to the mortgagees before she can recover possession; but the same may, at the same time, be made by the decree payable to her by her vendors. If nothing is proved due, and on the contrary a surplus is found due from the mortgagees, plaintiff may be ordered to obtain possession, and her vendors may be ordered to receive from the plaintiff the sum assigned to her for the mortgagees, as well as the surplus proceeds from them.

In a case between the plaintiff and the mortgagees, as all these issues are virtually covered by the second issue of the Principal Sudder Ameen, and it is not pleaded that evidence on these issues was excluded by him; as even, if any new issue of facts, not made by the Lower Court, was considered necessary to be decided, the Lower Court could be directed only to receive evidence upon

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and to try that issue and return the record to this Court for final orders; and as even if this Court thought that the accounts of the gross produce should be taken in this case, the final decision, after the accounts are taken below and sent up here, would rest with this Court; this Court, under Sections 351 to 354 both inclusive, could not remand this case to the Lower Court for a second decision. The opinion of this Court, however, is that the trial of this case has been altogether insufficient; that additional parties must necessarily be brought in as co-plaintiffs; that they are entitled to put in new pleas and fresh evidence, to hear the examination of witnesses heard in the case, and to cross-examine them in their new capacity as plaintiffs; that the account of the gross produce, on a quite new principle in a new case for a more extended purpose than could be taken in a case merely between the plaintiff and the mortgagees, has been found necessary to be taken. The Court, therefore, has no alternative but to remand the case for entirely a new trial, with reference to the remarks made above.

As to the stamp payable by the co-plaintiffs for the demand of mesne profits, if any are found due to them, and for the fixing of the valuation of the case for the purposes of payment of costs, and determining the *forum* of the first and second appeals, it is clear that the case, as it is valued, is appealable to this Court as well as to the Privy Council, and, by the directions given above, the valuation is not at all to be reduced. The question, whether it would be appealable to England or not after decree, would rest on the amount to be decreed and dismissed hereafter.

The Court below, in passing a decree in this case, will take care to advert specially to the question of costs, and will see that each party is called on to pay only that which the amount receivable, or the conduct of each party renders him liable to pay.

The 3rd February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Onus probandi—Rival tenants—Resignation of tenancy.

Case No. 1598 of 1863.

Special Appeal from a decision passed by Baboo Gunga Churn Sein, Principal Sudder Ameen of Dacca, dated the 29th January 1863, *reversing a decision passed by the Moonsiff of that District, dated the 20th January* 1862.

Kishen Chunder Shaha and others (Defendants) *Appellants,*

versus

Hookoom Chand Shaha and others (Plaintiffs) *Respondents.*

Baboos Upprokash Chunder Mookerjee and *Onookool Chunder Mookerjee* for Appellants.

Mr. G. Plowden for Respondents.

In a case between two rival tenants claiming to hold under the same landlord, where one of them admitted the tenancy of the other, but pleaded resignation by him of his tenancy and a lease to himself, the *onus* of proving the resignation was held to be on the former.

Kemp, J.—We think that, as the special appellant admitted the tenancy of the special respondent, be it a tenancy at will, or a tenancy of a more permanent nature (mokururee), and pleaded a resignation of his tenancy by the special respondent and a lease to him, the *onus* of proving this resignation was rightly thrown upon the special appellant.

It may be that the plaintiff, in alleging that he held under a mokururee pottah, and suing for a confirmation of his title under the same, has asked too much; but, as the question came before the Lower Court, it was one between two rival ryots, both claiming to hold under the same landlord; the only difference being that the prior tenancy of the special respondent is admitted by the special appellant, and that the latter has failed to prove a relinquishment of the title of the former, without which the latter can have no title at all.

We confirm the decision of the Lower Court; and, as there has been no decision upon the validity or otherwise of the mokururee title set up by the plaintiff, that remains an open question.

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The 3rd February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Estoppel—Consent—Sale by Hindoo Widow.

Case No. 382 of 1863.

Special Appeal from a decision passed by the Officiating Judge of the 24-Pergunnahs.

Bisheshur Mookerjee (Defendant) *Appellant,*

versus

Judoonath Bose and others (Plaintiffs) *Respondents.*

Baboos Kishen Kishore Ghose and *Chunder Madhub Ghose* for Appellant.

Baboo Sreenath Doss for Respondents.

The failure of a party to put in an answer in a former suit which in no way threatened his title as a reversioner, cannot be construed into a consent on his part to an alienation made by a Hindoo widow which has been found in a subsequent suit to be illegal on an issue raised to contest its validity as made without legal necessity.

Kemp, J.—A HINDOO widow alienated certain properties belonging to the estate of her deceased husband. On the suit of the reversioners, (the special respondents,) to set aside such alienation as made without legal necessity, the Judge below has held that the reversioner, at the time of the alienation by the widow who is since dead, did not give his consent to the sale; and, on the merits, that the sale, being made without legal necessity, was invalid, and not binding as against the reversioners; that the conveyance by the widow was only a conveyance of her life-interest.

The purchaser from the widow is by this decision left in possession during the lifetime of his vendor, the widow as the reversioners had failed to prove that the alienation was such an act of waste as to threaten the *corpus* of the estate, and to render it necessary to put the reversioners into immediate possession.

The purchaser of the widow's title is the special appellant, and the contention of his learned Counsel is that a former decree, passed on the suit of the purchaser, and to which the then reversioner, Gooroo Doss, was a party, acts as an estoppel, and is binding upon the present reversioners, although they were not *inter partes*, inasmuch as Gooroo Doss did not question the validity of the alienation by the widow in that suit, and thereby consented to such alienation.

The Lower Appellate Court having found that the alienation was not justified by any legal necessity, we have only to consider whether the decree, in the suit to which Gooroo Doss was a party, operates as an estoppel, or amounts at least to a consent on the part of Gooroo Doss.

We think that the Judge's decision is substantially correct. In the suit referred to by the learned Counsel for the special appellant, the vendee of the widow, the present special appellant, sued for possession of the property conveyed to him by his vender, on the allegation that Gooroo Doss, who resided on the estate conveyed, had refused to pay rent to him, and that by such refusal he had been ousted from the property purchased by him. In that suit, the issues laid down were whether the widow had any title to convey, whether she did convey her title, and, if so, whether the plaintiff had proved ouster. Gooroo Doss did not defend that suit, though made a party, and present by vakeel; but we think that the issues raised were not such as to affect his title as reversioner, or to render it necessary for him to defend the suit. The widow's alienation of her life-interest would be binding as against her. This point has been ruled by a recent decision of a Full Bench.* The validity of the alienation as against the reversioners, whose title to succeed had not opened out when this suit was brought, was not put in issue on the pleadings in that suit; we, therefore, hold that the failure of Gooroo Doss, to put in an answer in a suit, which in no ways threatened his title as a reversioner, cannot be construed into a consent on his part to an alienation, which has been found to be illegal on an issue raised to contest its validity as made without legal necessity.

We, therefore, dismiss this special appeal with costs and interest.

* *See* Sutherland's Full Bench Rulings, p. 165. This decision, though dated 7th April 1864, was orally delivered sometime previously.

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The 4th February 1864.

Present:

The Hon'ble G. Loch and J. P. Norman, *Judges.*

Mortgage—Notice of foreclosure—Section 8 Regulation XVII. 1806.

Case No. 34 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 28th November 1862.

Syud Eusuf Ali Khan and others (Plaintiffs) *Appellants,*

versus

Mussamut Azumtoonissa (Defendant) *Respondent.*

Baboo Kishen Kishore Ghose for Appellants.

Baboos Dwarkanath Mitter and *Unnoda Pershad Banerjee* for Respondent.

Suit laid at rupees 8,739-10.

The notice of foreclosure under Section 8 Regulation XVII. 1806 is not merely a preliminary proceeding leading up to a judgment of foreclosure to be subsequently pronounced in Court. It not only fixes the date from which the period, during which the mortgagor is to retain the right to redeem, is to be computed, but it is of itself the operative act in the foreclosure proceeding. The service of the notice, therefore, should be evidenced by the clearest proof, and be in all cases, if not personal, at least such as to leave no doubt in the mind of the Court that the notice itself must have reached the hands or come to the knowledge of the mortgagors.

Norman, J.—This was a suit to redeem certain property mortgaged by the plaintiff Syud Eusuf Ali Khan to the defendant by deed of conditional sale, dated the 2nd of Kartick 1235, to secure Sicca Rupees 10,000, on the allegation that the principal and interest have been realized from the usufruct of the property mortgaged.

The defendant pleaded that, on an application filed by her, the notice provided by Regulation XVII of 1806 was duly issued on the 6th of January 1840, and a proclamation made on the 5th of February in the same year, and that the case was struck off the file on the 27th of April 1840, but that the mortgagor did not deposit the principal and interest within the year, and therefore that the mortgage was foreclosed. She also pleaded limitation.

The records of the Judge's Court were burnt in the mutinies. But in order to prove the proceedings for foreclosure, the plaintiff in the Court below put in a vakalutnamah dated the 8th of November 1839, appointing Shaikh Barakut Hossein as vakeel for the purpose of presenting a petition for the foreclosure of the mortgage. This copy was taken from the Cazee's book, which was in the Judge's office. It was objected before us that, as the Cazee was not called, and no proof given that he was dead, the book was not admissible in evidence. *See* Taylor on Evidence, Section 635. But we overruled the objection on the ground that it should have been taken before the Principal Sudder Ameen, and that, if it had been so taken, the necessary evidence might have been given. The mortgage deed was then put in; and from an endorsement upon it, dated the 30th of December 1839, signed with the initials C. T. D., in the handwriting of a gentleman, who was the Officiating Judge of Behar at that date, it appeared that Shaikh Barakut Hossein, vakeel of Muteeoonissa bye-bil-wufadar, caused the deed to be put in. And by a further indorsement, the deed appeared to have been returned to the defendant on the 5th of February 1841. This evidence leaves no doubt in the mind of the Court that Barakut Hossein was appointed vakeel to present a petition for foreclosure, and that he must have presented a petition for foreclosure to the Judge, in compliance with Regulation XVII of 1806, Section 8.

In order to prove the next step, *viz.* that the mortgagor was served with a copy of the petition and the notice prescribed by that Section, witnesses were called, who proved that Muteeoonissa having brought a suit for foreclosure against Syud Eusuf Ali Khan, they took some document, which some of them describe as a hibanamah, and others as an italanamah to the house of Eusuf Ali and another the mortgagors, but did not find them. They then went to the house of Syud Ali, a merchant, and caused one Bolakee, who stated that he was a chowkeedar of the district, and Bechun Lal to give a receipt, which was attested by witnesses. Ram Dyal, dewan, states that the peadahs took the receipt and returned to the house of Muteeoonissa, and that he took and kept a copy of the italanamah and petition for foreclosure after the return of the peadahs.

There is nothing to shew that the notice must necessarily have come to the knowledge

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of the mortgagors. Whether it did so or not is merely matter for conjecture. Indeed, finding that the notice was not served personally, or by sticking up a copy on the house, it is quite possible that the mortgagors may have inferred, even if some rumour of the proposed foreclosure came to their ears, that the mortgagee did not mean to proceed further in the matter.

In Musst. Koonjoy Khibbhama *versus* Baboo Sheo Pursun Singh, it was held that the service of the notice of foreclosure under Section 8 Regulation XVII of 1806 need not be personal, but that the affixing of a notice to the house of the mortgagor would be sufficient. *See* S. D. A. Rep. 1854, p. 281.

We may observe that, by the Section now under consideration, the notification is not merely a preliminary proceeding leading up to a judgment of foreclosure to be subsequently pronounced in Court. It not only fixes the date from which the period, during which the mortgagor is to retain the right to redeem, is to be computed, but it is of itself the operative act in the foreclosure proceeding. We think, therefore, that the service of the notice must be evidenced by the clearest proof, and must in all cases be, if not personal, at least such as to leave no doubt on the mind of the Court, that the notice itself must have reached the hands, or come to the knowledge of the mortgagors. Not only do we find from the evidence of the witnesses that the notice was not duly served, but we find that, up to the present time, the mortgagee has commenced to pay in the Government revenue in her capacity as mortgagee, and designated herself as such in her chellans. Now, had the foreclosure been actually completed, it is most improbable that she would have failed to have had her name entered as proprietor in the Collector's Register.

The defendant also relied on a plea of limitation. But there is nothing in the evidence to show that he ever at any time gave the plaintiff notice that he was claiming to hold as on a title by foreclosure, or in any way adversely to the plaintiff's right to redeem, and, in fact, there is a good deal of evidence which would lead to an opposite conclusion.

We, therefore, reverse the decision of the Court below, and direct that the case be remanded to the Lower Court, in order that an account be taken against the defendant as mortgagee in the usual way.

The 5th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Plaint—Amendment—Rejection.

Case No. 182 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 21st November 1861.

Pitambur Mookerjee (Plaintiff) *Appellant,*

versus

Huree Narain Thakoor (Defendant) *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellant.

No one for Respondent.

Suit laid at rupees 10,251-8-14.

Where a plaint is wanting in precision or defective in form, it should be returned for amendment, and not rejected.

Kemp, J.—This decision is clearly wrong. The plaint was admitted and registered; if it was wanting in precision, or defective in form, the Court should have directed amendment, and not have rejected it.

Remand for trial, and amendment of plaint, if necessary.

The 5th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Evidence—Government Gazette—Sale.

Case No. 468 of 1861.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Zillah Rajshahye, dated the 28th Sept. 1861.

Jotendro Mohun Tagore (Plaintiff) *Appellant,*

versus

Ranee Brijosoondoory and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Sreenath Doss* for Appellant.

Mr. J. W. B. Money and *Baboo Mohesh Chunder Chowdhry* for Respondents.

Suit valued at rupees 14,764.

Under Section 355 Act VIII of 1859, the Government Gazette containing the advertisement of sale, and a printed paper purporting to be the conditions of sale

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alluded to in the Gazette, and issued from the Master's Office in the name of the Master, were admitted in evidence to prove the actual conditions of the deed of sale.

Campbell, J.—This was a suit to cancel a putnee tenure, and for possession with mesne profits.

The plaint declares briefly as follows :—That Rajah Bhyrub Indernarain Roy deceased, husband of the defendant Ranee Brijosoondoory, borrowed from one Bulloy Chand Dutt the sum of Rs. 35,000, on the security of a mortgage of a share in Pergunnah Lushkurpore ; that Bulloy Chand Dutt, whose name only was used in the transaction, and who had no beneficial title in the mortgage, conveyed all benefit of the powers and covenants under the mortgage to Gopal Chunder Bysack and Gopee Mohun Bysack ; that, subsequently on the application of one of the creditors of the late Rajah Bhyrub Indernarain Roy, one Taruckanath Mullick, and with the consent of the mortgagees, the rights and interest of the said Rajah, in the mortgaged property, were sold by public auction by the Master of the late Supreme Court, and were purchased by the plaintiff ; that, on taking possession of the purchased property, the plaintiff discovered that the Ranee, subsequent to the mortgage, had created a fraudulent putnee tenure in the names of her near relations. The object of this suit was to cancel this fraudulent alienation.

The defendant Sreenath Moitree answers that, after the death of the Rajah, his widow, the Ranee Brijosoondoory, on the 9th of Assar 1264 B. S. in virtue of the authority vested in her by her husband's will, and with the consent of the confidential mooktear of the late Rajah, did grant unto him a putnee pottah of lot Pootya and other villages for a consideration of Rs. 2,915 ; that he has conveyed his putnee title by deed of gift dated the 1st of Magh 1265 B. S. to his niece, the defendant Soorut Kaminee Dabea, the daughter of his late natural brother Rajah Bhyrub Indernarain Roy ; that this lady is in possession of the property, the subject of this suit, to which he has unnecessarily been made a party.

The defendant Ranee Brijosoondoory answers to this effect that, in virtue of the authority vested in her by the will of her husband, and for the purpose of paying his debts, she granted a putnee to the defendant Sreenath Moitree for a bonus of Rs. 2,915 ; that subsequently the putneedar conveyed his title to the defendant Soorut Kaminee Dabea, who is in possession ; that the purchase by the plaintiff of the parent estate is of date long subsequent to the creation of the aforesaid putnee ; that the sale of the parent estate was made on the application of the answering defendant, and with the consent of the mortgagees ; further, that the disputed putnee was reserved and protected by the conditions of the said sale.

The answer of the defendant Soorut Kaminee Dabea is in support of her mother's answer in every respect.

The Principal Sudder Ameen of Rajshahye, Baboo Koylash Chunder Deb, who tried this suit, laid down the following issues :—

1*st*.—Is the putnee set up by the defendants valid, and has it been proved ?

2*nd*.—Did the terms of the sale, which was made under the orders of the Supreme Court, protect and reserve the putnee title of the defendants ?

The Principal Sudder Ameen, after observing that the second issue must be disposed of first, inasmuch as, if decided in favor of the defendant, it would become unnecessary to answer the first issue, proceeded to record a decision briefly to the following effect :—

" That the plaintiff admits that the putnee in dispute was created prior to his purchase ; further it appears that, prior to the plaintiff's purchase, the Ranee defendant, with the consent of the mortgagees, moved the Supreme Court to order a sale of the parent estate with the reservation of certain putnee tenures (and amongst them the putnee in dispute) created by the Ranee and her deceased husband ; that the Supreme Court, in compliance with this motion, directed a sale to be made with a reservation of the putnee tenure, the subject of this suit ; that copies of the petition of the Ranee and of the proceedings of the Supreme Court which have been filed with the record show that this putnee was reserved and protected by the order of a competent Court ; and that the plaintiff purchased the parent estate, with full cognizance of such reservation and protection. The plaintiff's suit was therefore dismissed with costs bearing interest."

From this decision the plaintiff appeals.

We think that the Principal Sudder Ameen's decision is wrong, and that the suit must be remanded for a finding on an issue similar to that laid down by the Lower Court, but not tried, and which involves the validity of the putnee talook set up by the defendants.

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The evidence upon the record, as submitted by the Lower Court, is insufficient to enable us to "pronounce a satisfactory judgment upon that point." We are therefore unable to determine the case as laid down by the provisions of Section 353 of the Code of Civil Procedure without further reference.

Before giving our reasons for remanding the suit, we think it proper to state how the sale of the mortgaged property was brought about, and the effect of that sale, in as far as the interests of the plaintiff, the auction-purchaser, are concerned.

It appears that the late Rajah Bhyrub Indernarain died in debt. One of the creditors, by name Tarucknath Mullick, sued the Ranee Brijosoondoory as executrix of her husband, the aforesaid Rajah, for the recovery of certain monies due to him, and sought to stop a sale which the mortgagees were about to make. Upon this the Ranee petitioned the late Supreme Court, in which petition, after setting forth the facts of the mortgage by the Rajah, subject to a power of redemption, the creation of certain putnees by the Rajah prior to the mortgage, and which were reserved by the terms of the mortgage, the subsequent creation by herself of the putnee, the subject of this suit, in pursuance of the power of alienation, vested in her by the will of her husband, she proceeded to recite that, in default of payment of the half-yearly instalment of interest, and of the principal due under the mortgage, the mortgaged estate had been put up to sale, but had been bought in for rupees 92,000 ; and that one of the creditors, the aforesaid Tarucknath Mullick, had filed a bill of complaint against the petitioners and the mortgagees, praying for an injunction against the mortgagees from receiving the proceeds of sale, and against the petitioners from further meddling with the estate. The petition goes on to state that, in order to liquidate all the debts of the Rajah, the petitioners, in concert with the mortgagees, had endeavored to sell the mortgaged estate at a reasonable price, but without success ; that, if the same were sold by the Master of the Court under the orders of the Court, purchasers would come forward and bid a good price for the same ; that the mortgagees had consented to a sale, provided it were speedily made. The prayer of the petition was that the Court would be pleased to direct the Master to sell the mortgaged estate, subject to certain putnees mentioned in the petition ; that the mortgagee's lien be first satisfied from the sale proceeds ; and that, if insufficient for that purpose, the mortgagees were to be permitted to come in and rank as creditors.

The mortgagees, through their solicitor, assented to this arrangement, but the other creditors did not. On the 19th April 1858, the Supreme Court passed an order of the following purport :—That the Master was to take an account of what was due to the mortgagees ; that the property mortgaged was to be sold without prejudice to subsisting tenures, with the approbation of the Master ; that all proper parties were to join in the sale ; that, in case of disputes, the Master was to settle the conveyance ; that the mortgagees were to be entitled to bid at the sale ; that the proceeds of sale were to be credited to an account to be opened, entitled "the mortgage of Gopal Chunder Byeack," &c.; that, after satisfying the lien of the mortgagees, the balance, if any, was to be transferred to a fresh account to be entitled "the estate of the late Rajah Bhyrub Indernarain Roy." Subsequent to the date of this order, and previous to its being carried into execution by the Master, on the application of the creditor, the order was amended by a further order of the said Court passed on the 17th August 1858. This amendment is mentioned in the deed of conveyance to the plaintiff, but its terms are not there set forth. The Master, in pursuance of these orders, sold the estate, and the plaintiff became the purchaser for the sum of Rs. 95,000.

Such is briefly the history of this suit from the date of mortgage, to the date of plaintiff's purchase.

Mr. Money, the learned Counsel for the respondents, contended that the plaintiff purchased the parent estate subject to all subsisting tenures, valid or invalid, *bonâ fide* or otherwise, and that, as purchaser, he was simply entitled to collect the putnee rents, the whole estate being let out in putnee tenures.

The pleader for the appellant, Mr. Allan, on the other hand, urged that the sale was made subject only to valid subsisting tenures, and that the purchaser became entitled to try the validity of the pretended tenure. He relied on the deed under which the property was conveyed to the purchaser, as being without reserve, and giving to the purchaser the property absolutely. The deed of conveyance, prepared under the authority of the Master, and dated 26th April 1859, is a conveyance of the property by the mortgagee, and the executrix of the mortgagor. It recites the mortgage the proceedings and

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the amended orders of the late Supreme Court, describes the property, and conveys it in the usual English form, without any mention of the putnees in dispute. This deed also makes reference to the conditions of sale signed by the purchaser.

Mr. Money, the Counsel for the respondents, strongly argued that this deed of sale was to be treated as a form, and that the rights of the parties were to be determined, not by the letter of that deed, but by the recitals in the petition of the Ranee on which the sale was ordered. In order to prove the actual conditions of the deed of sale, Mr. Allan then produced and tendered in evidence the Government Gazette, containing the advertisement of sale, and a printed paper, purporting to be the conditions of sale alluded to in the Gazette, and issued from the Master's Office, under date the 26th August 1858, in the name of the Master, Mr. W. Macpherson. Mr. Money protested against the admission of these papers; but, with reference to the provisions of Section 355 of the Civil Procedure Code, the Court thought it right to inspect them; and in the course of the argument on the subject, Mr. Money's conduct having been such as, in the opinion of the Court, amounted to a contempt, he was required to leave the Court, and was not further heard. The Court then enquired whether the junior advocate for the respondent was ready and willing to go on, intimating its willingness to receive and listen to any application which might be rendered necessary by want of preparation or other difficulty on his part. He said that he was prepared to go on, and concluded the argument for the appellants. Mr. Money entered a protest against the hearing of the case in his absence. Before pronouncing judgment, we have ascertained, by reference to the records of the late Supreme Court, that the conditions of sale put in by Mr. Allan are those actually issued from the Master's Office at the time of the sale, and signed by the purchaser; and, were it necessary, these conditions would make it clear that the sale reserved valid tenures only. We have also ascertained that the order of 17th August 1858 amending the previous order was to this effect:—"That the order of 19th April 1858 be amended by striking out the words 'without prejudice to subsisting tenures.'" The difference between the order of 19th April and the terms of the deed of conveyance is thus simply accounted for. The deed of conveyance is certainly plaintiff's title, and it is free from any other reservation than that contained in the conditions of sale to which it refers. It is, therefore, quite clear that the purchaser took subject to valid tenures only. It might be a question whether a tenure created by the mortgagor, after the mortgage *bonâ fide*, and for valuable consideration, would be valid under the terms of this sale. But as the main contention of the appellant is that the tenure in dispute is in no sense valid and *bonâ fide*, we think it necessary that the issue upon that point should be determined before we dispose of the case. The Lower Court will try this issue:—"Is the tenure set up by the respondents valid and good against creditors generally, or invalid and made without due authority in fraud of creditors." The case will be returned to this Court with the finding on this issue. On the re-hearing, the orders of the Supreme Court, and the conditions of sale having been sent for by the Court, will be placed in evidence in the record of this suit, and, if necessary, we will consider the effect of a tenure created *bonâ fide* for value as against the present plaintiff purchaser under the sale. If the tenure is found not to be *bonâ fide* and valid, the plaintiff's (appellant's) claim must no doubt be decreed.

The 6th February 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Sale of Putnee Deposit—Registration.

Case No. 233 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 20th January 1863.

Kristo Jeebun Bukshee (Plaintiff) *Appellant,*

versus

Mr. A. B. Mackintosh and others (Defendants) *Respondents.*

Baboo Prosunno Coomar Sen for Appellant.

Mr. R. T. Allan for Respondents.

Suit laid at rupees 9,856.

Clause 1 Section 14 Regulation VIII. 1819 does not contemplate that *any* party may, by depositing the amount due, stay a sale of a putnee, but only a party having a *recognized* interest in such putnee.

According to Section 6, mere application for registration is not sufficient.

Bayley, J.—In this case the plaintiff, Kristo Jeebun Bukshee, sues for the posses-

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sion of a certain putnee, on an allegation of title by purchase of it from the putneedar Kalee Kant Chatterjee, on the 27th of August 1855, or 12th Bhadro 1261, in the name of plaintiff's mother Bishomoyee. Plaintiff also sues for the reversal of the sale of the said putnee which was made for default in the second half-yearly instalment of 1263 B. S., under Regulation VIII of 1819. Plaintiff alleges that there was no default, as he deposited the amount due from his own funds before the sale, in the character of purchaser, and as thus having an interest in the putnee.

The defendants are the purchasers and the zemindar. They aver that there was no *bonâ fide* purchase by Kristo Jeebun or his mother; that the deposit of Kristo Jeebun or of his mother was the deposit of a stranger, and not of the party in default; that, therefore, the zemindar was not legally bound to receive it as payment; and further that the plaintiff, even if depositor, was not registered in the defendant's serishtah as the putneedar; and that, therefore, the zemindar need not recognize any stranger or party other than the registered proprietor.

On these pleadings and the evidence adduced by the parties, the Lower Court held that plaintiff had not established the position of purchaser, and had no right to have the sale reversed.

That Court, therefore, dismissed plaintiff's suit.

Plaintiff appeals, urging the following pleas:—

I. That Section 14 Clause 1 Regulation VIII of 1819 allows a deposit by *any one;* and that this is clear by the fact of the Section providing that, if there be no balance due at the time of sale, no sale shall take place; that, therefore, all that has to be looked to, is whether the money due has been paid or not.

II. That even if this be not so, and the only party who may deposit be one having an interest in the property, the appellant is such party by right of his purchase, and thus equally there is no default, and the sale should be reversed.

III. That the appellant did apply for registration by the zemindar as required by law, and was refused, and that the zemindar (the Receiver of the Supreme Court) on two occasions accepted his payment of the putnee rents as good and sufficient payment, and thus recognised him, if not as putneedar, at any rate as a party having such an interest as would make his deposit sufficient to stay the sale.

IV. That the Deposit Register shews that Kalee Kant deposited the money before sale, and, therefore, there was no default even in the registered proprietor, and that this so stands in the Register by the Collector's order in a certain proceeding.

Judgment.

We are of opinion on the *first* point that Clause 1 Section 14 Regulation VIII of 1819 does not contemplate that *any* party may, by depositing, stay a sale of a putnee, but only a party having a *recognised* interest in such putnee. The words of the law alone even will hardly support the appellant's contention; and the Clause 1 Section 14, when read with the other parts of the same law, will by no means do so. It is provided in this law for the sale of putnees, what course a dur-putneedar or other party interested shall adopt, with a view to save the putnee from sale, and what interests such depositor may acquire by doing so. There is nothing in the law stating that strangers, without interests in the tenure, may acquire any rights. The policy of this and of the Revenue Sale Law is the same, *i. e.* to protect those who *are shewn to have interests* when the property in which they have those interests is brought to sale for the default of others.

This leads to the *second* point. Is appellant shewn to have such any interest in this putnee? His allegation is that he is a purchaser. No deed of sale is put in or proved by any reliable evidence, and no acts of real ownership are satisfactorily proved in support of the purchase. And here we may also notice the *third* plea of appellant. It appears, as appellant states, that the Receiver of the Supreme Court did accept payments of rent on two occasions from appellant; but it is clear from the same document which shews this that he did so under the most distinct protest of any recognition or acceptation of the appellant's title to be considered the putneedar. It is further pressed on us, on the part of appellant, that Bishomoyee applied to be registered, and the zemindar refused, so that appellant could do no more in furtherance of the course prescribed by law. On the other hand it is alleged that the appellant has been declared never to have purchased at all, and that he did not adopt the course prescribed by law, *viz.*, apply to the Judge for an injunction upon the zemindar to enforce registration under Section 6 Regulation

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VIII of 1819 The judgment relied on by respondent on this plea is dated 9th January 1863, No. 37 of 1860, Bishomoyee, appellant, *versus* A. B. Mackintosh and others. It shews that the alleged purchase of the *dur-putnee* was not in any way shewn by Bishomoyee, nor Kalee Kant's assent or admission of any such purchase or any transfer by Kalee Kant of his title to Bishomoyee. But it refers to the dur-putnee only. We think, too, that it is not enough to ask for registration only, but that Section 6 specifically provides what is legally to be done if the request be refused; and that this legal course was not adopted by appellant.

On the *fourth* plea we have only to observe that, although the Deposit Register gives the name of Kalee Kant as depositor, still appellant's own statement and contention throughout is that, in fact, Kalee Kant did not in any way whatsoever make the deposit. It is, therefore, a mere quibble on the part of appellant to try and take advantage of a statement in paper which he all along contends is not a statement of facts, nor does he show any order of the Collector on the point.

On all these grounds we see no reason to reverse the orders of the Court below, and we, accordingly, reject this appeal with all costs on appellant.

The 6th February 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Sale—Notice.

Case No. 1106 of 1863.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 27th January 1863, *modifying a decision passed by Baboo Anund Chunder Banerjee, Principal Sudder Ameen of that District, dated the 4th June* 1862.

Woomanath Roy and others (Plaintiffs) *Appellants,*

versus

Joyuntee Debia (Defendant) *Respondent.*

Mr. R. T. Allan and *Baboo Sreenath Doss* for Appellants.

Baboo Bhugobutty Churn Ghose for Respondent.

The notice of the interests to be put up for sale is alone what must be looked to as affording an estimate of the value and extent of the purchase.

Seton-Karr, J.—It is argued in this case that the Judge was wrong in holding the sale for arrears of rent to have been a sale of the actual mehal or jote in entirety, and that the Lower Appellate Court should have limited the sale to what the *lotbundee* or notice distinctly specified, and to what in this view the purchaser must knowingly have bought.

We think, after hearing both parties on this point, that there is force in this objection. The sale disposed of the shares of Huro Soonduree, Raj Coomaree, and Gobind Monee, excepting those of other shareholders, and there is no judicial finding on an allegation now made before us that the share of Indro Monee, who is represented by the appellant before us, had been previously made over to Gobind Monee.

In this view on the broad and, as we think, the correct principle that the notice of the interests to be put up for sale is alone what we have to look to as affording an estimate of the value and extent of the purchase, we reverse this portion of the Judge's order, and restore the ruling of the Court of first instance. Costs to the appellant.

The 6th February 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Special Appeal.

Case No. 1122 of 1863.

Special Appeal from a decision passed by Baboo Huro Chunder Chatterjee, Principal Sudder Ameen of West Burdwan, dated the 31st January 1863, *reversing a decision passed by the Moonsiff of that District, dated the 28th July* 1862.

Bheem Rokheet and others (Plaintiffs) *Appellants,*

versus

Sartuck Chunder Rana and others (Defendants) *Respondents.*

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Baboo Greesh Chunder Ghose for Appellants.

Baboos Anund Gopal Paleet and *Rajendro Narain Bose* for Respondents.

A special appeal, and not a new suit, should be brought to contest a legal point involved in an adverse decree.

Loch, J.—THE circumstances of this case are as follow :—This suit is to recover possession, and it has been dismissed, as the Lower Appellate Court holds that the claim has been decided in another suit. The present defendant brought an action against the present plaintiffs claiming certain land under a deed of sale executed by one Mohun Rokheet. This suit was dismissed. He then sued Rokheet to recover the purchase-money and got a decree, and in execution sold the land in question, and purchased it himself. He then brought an action against the present plaintiffs, who are relatives of Mohun Rokheet, and ultimately got a decree for the whole property. The present plaintiffs now sue to get rid of the effect of that decision, and to recover possession of which they had been deprived by defendant in execution of his decree, but the Lower Appellate Court holds that the question between the plaintiffs and defendant had already been disposed of, and dismissed the suit.

Plaintiffs come up in special appeal on the ground that, in the former suit, the Court did not adjudicate on the title of the present plaintiffs, but merely passed a decree giving defendant possession on the strength of his bynamah, and that therefore they can bring the present action for the determination of this point. But the proper course for the plaintiffs to have pursued, and which they have neglected to do, was on the decision of the former case to have brought a special appeal on the legal point which they now raise ; but instead of doing this, they remain quiet from 1855 to the end of 1858 ; and in the meantime as the plaintiff's pleader admits, the defendant sued them for mesne profits, and gained a further decree against them. The effect of the decision in the former case was clearly to set aside the title of the plaintiffs, and establish that of the defendant over the whole property ; and if plaintiffs suffer in this case, it is by their own neglect. We dismiss the appeal with costs.

The 9th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Hindoo Families (Law applicable to)—Presumption.

Case No. 181 of 1863.

Regular Appeal from a decision passed by the Judge of Nuddea, dated the 26th September 1861.

Lukkea Debea (Plaintiff) *Appellant,*

versus

Gungagobind Dobey and others (Defendants) *Respondents.*

Baboo Poran Chunder Mookerjee for Appellant.

Mr. R. T. Allan and *Baboos Kishen Kishore Ghose, Doorga Doss Dutt, Debendernarain Bose,* and *Onookool Chunder Mookerjee* for Respondents.

Hindoo families are ordinarily governed by the law of their origin, not by that of their domicile. The presumption is in favor of the law of origin until the adoption of the law of a new domicile is proved.

Campbell, J.—THE parties are members of a joint Hindoo family. Plaintiff, a widow of one of the members of the family, claims her husband's share of the estate in accordance with the Bengal Law. Defendants resist the claim on the ground that the family is governed not by the Bengal but by the Mitaksharah Law, and that plaintiff's husband has been dead many years during which she has never enjoyed or claimed any share in the estate.

We find that the principle has been established that Hindoo families are ordinarily governed by the law of their origin, not by that of their domicile, that the presumption is in favor of the law of origin, till it is proved that they have adopted the law of a new domicile. That principle is clearly set forth in a decision of a Bench of three Judges in the case of Gobind Chunder Roy *vs.* Shusty Kanto Roy, No. 3 of 1862, decided on the 11th February 1863,* and is not now disputed. In the present case it is admitted that the parties are Brahmins of Bundlecund settled in Bengal for three generations. The question then is whether plaintiff has made out by proof their adoption of the Bengal Law, so as to overthrow the presumption in favor of the law of origin. We think that she has not done so, and that the Judge has rightly dismissed her

* *See* Sutherland's Full Bench Rulings, p. 75.

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suit. It is admitted that certain popular feasts and ceremonies have been observed after the fashion of the country of residence, *i. e.* Bengal, but the evidence goes to show that, on the weightier and more important occasions, the family have continued to keep by the law of their origin. It is rightly observed by the Judge that the witnesses brought by the plaintiff to support a contrary averment are not of a character to carry weight in such a matter, and their evidence is by no means strong. There is no attempt to make out any case of succession of widows, or other instance of the adoption of the Bengal Law in matters of inheritance. It also seems pretty clear that plaintiff has for many years tacitly assented to the operation of the other law. Though the family may have been joint, she was probably not ignorant that the defendants have put themselves forward as sole proprietors of the estate.

It is urged that the Lower Court refused to grant a postponement to enable plaintiff to summon better witnesses ; but we find that during eight months all was done, that the Court could do, to obtain the attendance of any witnesses subpœnaed by her, and we do not attach weight to this objection. In one instance the Court seems to have stopped a question put by the defendants for reasons which are not very strong, but the questions might easily have been pressed by plaintiff in a more direct and simple form; and as she did not do so, it is hardly for her now to object to the disallowance of the defendants' question. Her Counsel also wishes to re-examine the defendant in this Court ; but as he has already been examined, we see no occasion to re-open the case in this way.

We dismiss the appeal with costs, and Government will be entitled to realise the value of the stamp from the pauper plaintiff. The intervenors who have appeared will also get their costs from plaintiff.

The 9th February 1864.

Present :

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Limitation—Suit by surety of lessee (for refund of rent paid to wrong party).

Case No. 183 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 5th February 1863.

Roy Huree Kishen (Plaintiff) *Appellant,*

versus

Ranee Asmedh Koonwar and others (Defendants) *Respondents.*

Moonshee Ameer Ali and Baboo Onookool Chunder Mookerjee for Appellant.

Mr. R. E. Twidale for Respondents.

In a suit by the surety of a lessee for the refund of rent paid to the wrongful heir of the deceased lessor, the cause of action as against the wrong-doers dates from the time when they were declared by a competent Court to have paid to a party without title; and the cause of action as against the lessee dates from the time when the surety was made to pay the rent to the rightful heir on default of the lessee.

Kemp, J.—THIS was a suit to recover the sum of rupees 20,000 with interest thereon, amounting to a further sum of rupees 2,000.

The father of the plaintiff stood security for a lessee. It is alleged that the defendants, who are the daughter and wife of the lessor, realized the rent of the leased estate for the year 1234 Fuslee, and also for other years. Subsequently, Baboo Roop Narain Singh obtained a decree in a suit brought by him to establish his right of inheritance as against the female defendants in this suit. Roop Narain then sued for the rent of the year 1234, as well as for other years, and obtained a decree against the lessees and their sureties the plaintiffs, and the sureties had to pay the rent to Roop Narain. This suit is brought for a refund of the rent realized by the female defendants.

The Principal Sudder Ameen dismissed the suit of the plaintiff. He was of opinion that there was no reliable evidence to shew that the defendants had realized the rent. With respect to costs, the order was that each party bear its own costs.

The female defendants appeal separately for their costs, and also, under Section 348 of the Code of Procedure, take exception to the finding of the Principal Sudder Ameen on the issue in bar. They urge that the suit of the plaintiff is barred under the Statute of Limitations, and we are of opinion that this plea is a good one.

The plaintiffs appellants urge that their cause of action must date from 1858, when they paid the money as per amicable agreement entered into with the decree-holder Roop Narain, and that their suit, which was brought in 1861, is not barred.

We are, however, clearly of opinion that the plaintiff's cause of action dates from the year 1841, when they were declared by the decree of a competent Court to have paid the

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rents to a party without title, *i. e.* to the defendants. The payment of the rent to the ladies, the defendants in this suit, even if proved, was not a sufficient payment as against the legal heir, Roop Narain. In 1841 the plaintiffs were declared liable as having paid to the wrong party, and they should have brought their suit against the wrong doers within 12 years from that period; not having done so, their claim is barred. Their cause of action, as against the lessees, dates from the time when they were made to pay the rents to Roop Narain on default of the lessees, or in 1858. They may, therefore, take a decree against the lessees who have been made respondents, and who have made no good defence; but their suit, as against the Ranee Asmedh Koonwar, must be dismissed with costs and interest.

This appeal is also dismissed with costs and interest in as far as the aforesaid Ranee is concerned.

The 9th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Parol evidence (to contradict deed)—Estoppel.

Case No. 1582 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 10th January 1863, affirming a decision passed by the Sudder Ameen of that District, dated the 23rd August 1861.

Messrs. Erskine and Co. and others (Defendants) *Appellants,*

versus

Okhoy Chunder Dutt and others (Plaintiffs) *Respondents.*

Mr. R. T. Allan and *Baboo Banee Madhub Banerjee* for Appellants.

Baboos Juggodanund Mookerjee and *Kishen Kishore Ghose* for Respondents.

Parol evidence cannot be admitted to contradict a deed except where fraud, mistake, surprise, or the like is alleged.

The plaintiffs having in a former case, in which certain property was attached as theirs by their creditors, allowed the defendants to claim and take it,—HELD that they could not now be permitted to make a contrary averment.

Campbell, J.—PLAINTIFF by deed of sale, the genuineness of which is not disputed, sold the property in dispute, an indigo factory, to defendants for Rs. 1,000. He now says that the sale was coupled with a verbal arrangement that the transaction should be considered to be a mortgage only, and that he should recover his estate on re-paying the money. He now sues for the recovery of the estate on those terms.

After the sale to defendants, they leased the property to plaintiff for the manufacture of indigo for seven months in each year, at a rent of Rs. 120, so that plaintiff retained as tenant a certain possession till, defendants seeking to oust him, he brought this suit. It does not appear whether the property produced anything, or was used by either party during the five months of each year not covered by the lease to plaintiff.

The Principal Sudder Ameen, considering the verbal agreement alleged by plaintiff to be proved, decreed his suit.

Defendants specially appeal on the ground

1.—That parol evidence cannot be admitted to contradict a written document.

2.—That plaintiffs having, in a former case in which the property was attached as theirs by their creditors, allowed defendants to claim and take it, cannot now be permitted to make a contrary averment.

The *first* point is very important, and we have carefully considered it, the more so as the only precedents on the point to be found are opposed to one another.* We think that the practice, which has, by a long course of practice, been established in England, is that which may be considered to be, in the main, applicable to all civilised countries, *i. e.* that primarily and ordinarily a solemn and formal deed cannot be set aside by parol evidence directly contradicting its terms (for, in that case, all titles and all engagements would be worthless); but that this rule must be subject to many equitable exceptions in special cases in which special grounds are alleged, such as fraud, mistake, surprise, and other grounds familiar to Courts of Equity. The case, quoted to us which comes nearest to the present, is one decided by the Privy Council in appeal from the Courts of Canada, in which a man was induced to endorse over the title deeds of his estate as security for a loan, and it was held that the circumstances entitled the vendor to relief. The case set up by the plaintiff bears some analogy to this last mentioned.

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* *See* Full Bench Rulings on this point in 5 Weekly Reporter, pages 68 and 76.

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We should be very unwilling to sanction a doctrine which would render the best authenticated sales of real property in this country utterly insecure, and render them liable to be questioned after 50 years by setting up parol evidence to nullify them. We wish that the law permitted us to review and scrutinize, in the very strict way in which it should be scrutinized, the evidence set up in this case; and if the defendant had received and retained absolute and unqualified possesssion of the property purchased, we might, perhaps, not have thought the case set up sufficient in law. But, under the peculiar circumstances of a certain possession held by plaintiffs, we are not quite prepared to say that the facts, found by the Principal Sudder Ameen, will not justify his decision.

On the *second* point, however, we think that the decision must be reversed.

It is clear that the rights of some of the present plaintiffs in the property in dispute were attached, and that they defeated their creditors by allowing defendants to claim and obtain the absolute property. We think that it would be contrary to public policy to allow those same parties now to plead their own fraud. And although the shares of certain of the plaintiffs were not then attached, still, as the plaintiffs formed one family, we think that they must have been cognizant of those proceedings which were attended by a Mofussil investigation into the rights of the parties; and that they tacitly allowed defendants to claim and take the whole property as theirs. We think, therefore, that all the plaintiffs are now stopped and barred from coming into Court to claim the property which they have, by their conduct, admitted to be defendant's, and that this admission overrides the alleged prior parol agreement. We, therefore, decree the special appeal with costs.

The 9th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Sale of land for arrears of Revenue—Butwarah.

Case No. 291 of 1863.

Regular Appeal from a decision passed by Baboo Ramtaruck Roy Bahadoor, Officiating Principal Sudder Ameen of Rungpore, dated the 28th February 1863.

Fukeer Chunder Shaha and others (Plaintiffs) *Appellants,*

versus

Nobodeep Chunder Shaha and another (Defendants) *Respondents.*

Baboos Kishen Kishore Ghose, Onoocool Chunder Mookerjee, and *Opprokash Chunder Mookerjee* for Appellants.

Mr. H. Stainforth and *Baboos Sreenath Doss* and *Kishen Doyal Roy* for Respondents.

Suit laid at rupees 12,045.

The purchaser of a specific portion of the land of an estate separately registered with a separate jumma under Section 11 Act XI of 1859 is not entitled to claim a Butwarah of the whole estate and to obtain a share of the whole land proportioned to the amount of sudder jumma paid by him.

Campbell, J.—PLAINTIFF is the holder of a specific portion of the land of an estate separately registered under Section 11 Act XI of 1859. The property held by him is a certain mouzah, one of several comprised in the mehal, and the sudder jumma attached to it is that found in the quinquennial papers as the jumma of the mouzah. After the mouzah was registered with the aforesaid jumma under Act XI of 1859, it was sold for arrears of revenue, and bought by plaintiff, who now seeks to have a Butwarah of the whole estate, and to obtain a share of the whole land proportioned to the amount of sudder jumma paid by him. But we can find no authority whatever for such a claim. Plaintiff does not hold any fractional share of an estate in common tenancy, and his holding was not registered under Section 10 of Act XI of 1859. He owns certain lands within the estate described as Mouzah Nij Borrodaha. These lands were separately registered under Section 11 (as distinguished from Section 10), and he has no claim to any particular share of the lands of the whole revenue-paying mehal. The estate is now of the nature of a putteedaree estate, and whatever remedy plaintiff might have, if he had been deprived of any of the lands belonging to his mouzah, he cannot claim any portion of the other lands of the estate. There is no trace of such a right in the Butwarah Law, Regulation XIX of 1814. The right to claim a division of the land is there given only to sharers in estates held in common tenancy, as defined in Section 30. This estate is in no sense held in common tenancy in accordance with that definition. Plaintiff, therefore, can only have the lands of Mouzah Nij Borrodaha. His

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claim to a Butwarah, by division of the whole lands of the mehal, was rightly dismissed, and the appeal is dismissed with costs.

The 10th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Onus probandi—Hindoo Law—Streedhun.

Case No. 1662 of 1863.

Special Appeal from a decision passed by Moulvee Itrut Hossein Khan, Principal Sudder Ameen of Sarun, dated the 12th March 1863, *affirming a decision passed by the Sudder Ameen of that District, dated the 1st November* 1862.

Brojomohun Mytee and others (Defendants) *Appellants,*

versus

Mussamut Radha Koomaree and others (Plaintiffs) *Respondents.*

Baboos Kalee Kishen Sein and *Kishen Succa Mookerjee* for Appellants.

No one for Respondents.

A Hindoo wife, seeking to exempt property from responsibility for her husband's debts, must clearly prove that she had *streedhun*, and that she purchased the property with her self-acquired funds.

Kemp, J.—THE special appellant, a judgment-creditor, seeks to sell a certain property in satisfaction of his decree.

A claim is set up by the wife of the judgment-debtor on the allegation that she purchased the property with her *streedhun.* The wife being the plaintiff in the present suit, and her husband the judgment-debtor being still alive, the *onus* of proving that she had *streedhun*, and that the property was purchased *bonâ fide* with her exclusive funds is upon her. The Lower Appellate Court has thrown the *onus* wrongly on the judgment-creditor.

The wife, seeking to exempt property from responsibility for her husband's debts, must very clearly prove that she had *streedhun*, and that she purchased the property with her self-acquired funds.

Remand for trial with reference to these remarks.

The 10th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Limitation (Act XIII of 1848)—Assessment of Lakheraj—Boundary decree.

Case No. 1603 of 1863.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 18th February 1863, *reversing a decision passed by Baboo Anund Chunder Banerjee, Principal Sudder Ameen of that District, dated the 27th June* 1862.

Mahomed Ali Khan Chowdry (Plaintiff) *Appellant,*

versus

Jadub Chunder Chuckerbutty and others (Defendants) *Respondents.*

Baboos Mohinee Mohun Roy and *Mohesh Chunder Chowdry* for Appellant.

Baboos Nil Madhub Sen and *Sreenauth Doss* for Respondents.

Act XIII of 1848 cannot be applied to bar a suit to assess land as rent-paying.

A decision in a boundary suit decides only the question of right to possession of the land, irrespective of the right to assess.

Campbell, J.—THE Judge has applied Act XIII of 1848 to bar a suit to assess land as rent-paying, *i. e.* he says that three years having passed since defendant's boundaries were marked, the lakheraj cannot now be disputed. But we think that this view of the matter is wrong. The boundary case only decided the question of right to possession of the land. The right to hold rent-free could not be affected by any such decision. Plaintiff does not sue for possession, but only to assess. The case must be remanded to try the right to assess irrespective of Act XIII of 1848.

The 10th February 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Pre-emption—Tullubi Ishtahad.

Case No. 880 of 1863.

Special Appeal from a decision passed by Mr. E. F. Lautour, Judge of Patna, dated the 14th January 1863, *reversing a*

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decision passed by the Moonsiff of that District, dated the 23rd July 1862.

Bhowanee Dutt (Defendant) *Appellant,*

versus

Lokhoo Singh (Plaintiff) *Respondent.*

Baboos Kishen Succa Mookerjee and *Moulvee Syud Murhumut Hossein* for Appellant.

Mr. C. Gregory and *Baboo Onookool Chunder Mookerjee* for Respondent.

Under the Mahomedan Law it is essential to the right of pre-emption to prove the performance of the Tullubi Ishtahad.

Jackson, J.—THE plaintiff in this suit claimed to enforce his right of pre-emption in respect of certain property which one of the defendants had sold to another. The first Court dismissed the suit on the ground that the plaintiff had not performed the preliminary steps after hearing of the sale. The Judge, on appeal, decided that "the Tullubi "Moasibut was done according to the law of "pre-emption. Tullubi Ishtahad was not "done in the village, but that omission does "not invalidate plaintiff's claim," and he therefore reversed the first Court's finding, and decreed the claim

The defendants, on special appeal, state that the Judge has not found that the Tullubi Ishtahad was performed; but on the contrary that he finds that it was not performed in the village; and that, under the Mahomedan Law, it is essential to the plaintiff's right of pre-emption that he should prove that that ceremony was performed, and that the Judge should pass a decision upon it.

The judgment of the Lower Court is, if not defective, certainly not explicit as to the performance of the Tullubi Ishtahad. The decree in the absence of a finding on that point cannot be sustained. It is reversed, and the case remanded, in order that the Judge may decide that question, and then pass a fresh judgment.

The 10th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Limitation—Section 230 Act VIII of 1859.

Case No. 1647 of 1863.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 25th February 1863, *affirming a decision passed by Baboo Anund Chunder Banerjee, Principal Sudder Ameen of that District, dated the 31st July* 1862.

Kishen Soondur Talookdar (Plaintiff) *Appellant,*

versus

Fukeerooddeen Mahomed and others (Defendants) *Respondents.*

Baboos Sreenath Dass and *Bhugobutty Churn Ghose* for Appellent.

Baboos Onookool Chunder Mookerjee and *Upprokash Chunder Mookerjee for* Respondents.

In default of application by a person other than a defendant dispossessed of any land or other immoveable property in execution of a decree, a suit would not be barred under Section 230 Act VIII of 1859 if brought within 12 years from date of cause of action.

Kemp, J.—WE think that the Judge is clearly wrong in applying the provisions of Section 230 of Act VIII to this claim. That Section does not enact that, unless an application be made within one month, it will be beyond time. It enacts that parties other than defendants *may* apply to the Court if they are dispossessed of any land or other immoveable property in execution of a decree. In default of application, a suit would not be barred if brought within 12 years from date of cause of action.

Remand for trial.

The 11th February 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonauth Pundit, *Judges.*

Enhancement—Various lands—Special Appeal.

Case No. 1513 of 1863.

Special Appeal from a decision passed by Mr. A. W. Russell, Judge of Jessore, dated the 21st February 1863, *reversing a decision of Baboo Obhoy Coomar Dutt, Principal Sudder Ameen of that District, dated the 23rd December* 1861.

Baboo Gooroodoss Roy (Plaintiff) *Appellant,*

versus

Baboo Hurronath Roy and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Hemchunder Banerjee* for Appellant.

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Baboos Obhoy Churn Bose and *Sreenauth Doss* for Respondents.

In a suit for enhancement, the omission of the Ameen or Judge to appropriate to every portion of the land which varies in quality its own rent, or to specify the rate which each particular kind of land should bear in striking a certain average rate per beegah, is no ground of special appeal.

Morgan, J.—It is a remarkable coincidence that the defendant having set up a pottah, which is afterwards shown to be a forged, or not a genuine instrument, and there having been an enquiry to fix what rate of rent he ought to pay, the result of an elaborate enquiry is that the precise rate mentioned in this fictitious pottah is really the rate which he ought to have paid, as being the rate current in the district. But, however this may be, we are here in special appeal to adjudge nothing but questions of law, and it is perfectly clear in this case that there has been an enquiry by the Ameen, and that the Judge thinks it a full enquiry, and has adopted it. There is, therefore, an end of the matter. We do not see, on the face of the proceedings, that either the Ameen or the Judge ever specifically appropriated to every portion of this land which varies in quality its appropriate rent. But it is not necessary that that should be shown. They have arrived after enquiry at this result that, taking the land to consist of so many beegahs, the rate fixed is an average rate on the whole quantity. We cannot, in special appeal, set that conclusion aside, upon the objection which has been urged that the Ameen or Judge has nowhere specified the rate which each particular kind of land should bear, in striking a certain average rate per beegah.

Special appeal dismissed with costs and interest.

The 11th February 1864.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Deed of sale.

Case No. 1064 of 1863.

Special Appeal from a decision passed by Moulvee Itrut Hossein Khan, Principal Sudder Ameen of Sarun, dated the 7th February 1863, *affirming a decision passed by Moonshee Fureed Buksh, Moonsiff of that District, dated the 6th August* 1862.

Bhikun Singh and others (Plaintiffs) *Appellants,*

versus

Musst. Jumeela Koonwar and others (Defendants) *Respondents.*

Baboos Kishen Succa Mookerjee and *Debendro Narain Bose* for Appellants.

Baboo Kalee Kishen Sein for Respondents.

A deed of sale is complete on the date when it is signed and attested by the Cazee, and consideration is paid for it. Delay in the delivery of the deed does not invalidate it.

Jackson, J.—The plaintiff Bhikun Singh purchased an estate from one of the defendants Bhagoo Singh, and now sues to get possession of that estate from his vendor and from another defendant Jumeela Koonwar, who alleges that a previous sale of the same estate was made to her.

The Lower Appellate Court has dismissed the claim, finding that the previous sale to Jumeela Koonwar had been so far effected that the purchase-money was paid, and the deed of sale, as well as the receipt for the purchase-money, attested by the Cazee, and that the vendor had admitted receipt of the purchase-money ; but that the deed of sale had not been delivered to Jumeela Koonwar until after the second sale was made to the plaintiff. The Court considered the sale complete, even though the deed was not delivered.

On special appeal, it is urged that the sale was not complete until the deed was delivered, and the precedent of the 27th September 1860, page 239, is quoted to that effect. But we find that, in that case and all the other analogous cases, the purchase-money was not paid. Here the purchase-money was paid, the deed of sale and the receipt registered in the Cazee's Office, and it is in evidence that the deed of sale was not delivered until some dispute with the plaintiff as to a mortgage on the same land was settled. The delay in the delivery of the deed does not invalidate the deed which was complete on the date it was signed and attested before the Cazee, and consideration was paid for it. The appeal is dismissed with costs.

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The 11th February 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Julkur.

Case No. 1077 of 1863.

Special Appeal from a decision passed by Mr. A. W. Russell, Officiating Judge of Jessore, dated the 26th January 1863, *affirming a decision passed by Baboo Woopendur Chunder Nyaruttun, Principal Sudder Ameen of that District, dated the 31st December* 1860.

Baboo Chunder Coomar Roy (Defendant) *Appellant,*

versus

Rajah Buroda Kant Roy (Plaintiff) *Respondent.*

Baboos Banee Madhub Banerjee and *Sreenath Doss* for Appellant.

Baboos Obhoy Churn Bose and *Baneenath Bose* for Respondent.

Where it is found as a fact that both water and land are the property of the zemindar as such, the two rights are not to be separated.

Bayley, J.—In this case the plaintiff in the capacity of zemindar sued for certain lands as dried up from the julkur of his zemindaree.

Defendant denied that they belonged to plaintiff, and pleaded that, even if the right to julkur was with the plaintiff, the right to the land below the water would belong to defendant as part of defendant's zemindaree along with which it was.

The Lower Appellate Court has now held, upon the consideration of all the evidence and the report of an Ameen as part of it, that the lands sued for, being part of plaintiff's zemindaree and his original bheel and julkur, should be awarded to plaintiff, and it gives plaintiff a decree accordingly.

Defendant appeals specially and urges that, even if the plaintiff had the julkur as found by the Judge, the lands underneath the water, when the latter is dried up, would still attach to defendant's zemindaree with which they lie, and the pleader refers to certain decisions ruling that the right of julkur does not carry with it the right to the lands under the water.

In this case the Judge has found, on a careful consideration of all the evidence, that the lands claimed by plaintiff are part of his zemindaree, being lands underneath that julkur which was held by him as zemindar, and the water of which julkur had dried up. This is a clear finding of fact with which, in special appeal, we cannot interfere. The plea taken in special appeal, and in support of which the pleader refers to the precedents of this Court, is not tenable. It has, it is true, been held by this Court that, where a julkur pottah has been given to a party, the pottadar cannot have a right to the zemindar's lands, on the water receding and the land drying up, and there are analogous rulings.. But there is no ruling that, where it is found as a fact that both water and land are the property of the zemindar as such, the two rights are to be separated. We see no ground to allow this special appeal, and we accordingly reject it with costs.

The 11th February 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Suit—Bond (Law proceedings).

Case No. 1518 of 1863.

Special Appeal from a decision passed by Mr. J. S. Bell, Judge of the Small Court, with powers of Principal Sudder Ameen, of Dacca, dated the 27th February 1863, *reversing a decision passed by Mr. T. C. Pennington, Sudder Ameen of that District, dated the 8th May* 1862.

Nobeen Chunder Ghose and others (Plaintiffs) *Appellants,*

versus

Ramgogernath Gope and others (Defendants) *Respondents.*

Baboos Chunder Madhub Ghose and *Greeja Sunker Mozoomdar* for Appellants.

Baboos Romesh Chunder Mitter, Banee Madhub Banerjee, Hem Chunder Banerjee, and *Prosonno Coomar Sein* for Respondents.

A suit will lie on a bond given for the purpose of securing money to be expended in carrying on law proceedings.

Morgan, J.—The Lower Appellate Court has reversed the decree of the Court of first instance on the ground that the bond on which the plaintiff sued was given for the purpose of securing money, which was to be expended in carrying on certain law proceedings. The Lower Appellate Court held that this was an illegal purpose, and that the bond must be declared void. But the

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ground taken by the Lower Appellate Court conflicts with many decided cases, and its decision therefore cannot stand.

The decision of the Lower Appellate Court is accordingly reversed, and this appeal decreed with costs and interest. The result will be that the decree of the Court of first instance will stand in the terms in which it was given.

The 15th February 1864.

Present:

The Hon'ble H. V. Bayley and L. S. Jackson, *Judges.*

Alluvial land.

Case No. 365 of 1863.

Regular Appeal from a decision passed by the Judge of Rajshahye, dated the 21st April 1863.

Keshub Lall Chowdhry and others (Plaintiffs) *Appellants,*

versus

Messrs. Robert Watson & Co. (Defendants) *Respondents.*

Baboo Sreenath Doss for Appellants.

Mr. R. T. Allan and *Baboo Onoocool Chunder Mookerjee* for Respondents.

Suit laid at rupees 14,066-3.

Clause 2 Section 4 Regulation XI. 1825 does not apply to the case of an estate entirely lost by diluvion.

Jackson, J.—We think that the Judge's decision in this case was manifestly right.

The plaintiffs could only have claimed these lands as accretions to an estate of theirs; but their estate has not only been entirely lost by diluvion, but has actually been removed many years since from the rent-roll of the district. Clause 2 Section 4 Regulation XI of 1825 cannot in any way help the plaintiffs, for that Clause refers only to cases where a sudden change, in the course of a stream, has broken through and intersected an estate, leaving an identifiable portion of land separated by the new channel from the main body of the estate. The state of things in the present case is wholly different, the river having, by gradual encroachments, carried away the whole estate.

Reference has been made to a decision of this Court printed at page 284 of Messrs. Hay's Report for September 1862.* We do not think that that decision was meant to go so far as the words used might seem to imply.* In any case the decision in question will not cover the present case, for there is no pretence of identifying the lands otherwise than by alleged identity of situation.

The plaintiffs urge that the defendant acquired possession of this land under color of an *izara*, which they held from the plaintiffs of lands lying on the south side of the river. This, if true, would not entitle the plaintiffs to claim possession of the land from the defendants in possession; but we also think that the fact is not shown to be so.

We therefore affirm the judgment of the Court below, and dismiss this appeal with costs.

The 15th February 1864.

Present:

The Hon'ble H. V. Bayley and L. S. Jackson, *Judges.*

Alluvial land.

Case No. 370 of 1863.

Regular Appeal from a decision passed by the Judge of Rajshahye, dated the 25th April 1863.

Bhoobun Mohun Sircar (Plaintiff) *Appellant,*

versus

Messrs. R. Watson & Co. and others (Defendants) *Respondents.*

Baboo Debendro Narain Bose for Appellant.

Mr. R. T. Allan and *Baboo Onoocool Chunder Mookerjee* for Respondents.

As long as any portion of an estate is in existence, the zemindar is entitled to claim the land accreting to it as forming by law part of that estate.

Jackson, J.—This case in most respects resembles the case No. 365 of 1863, which we have this day determined. It has, however, one important element of difference, namely, that the zemindar whom, to a limited extent, the plaintiff represents, is the owner of an estate now paying revenue to Government. There is therefore a right in being, on which the claim to the lands involved in the present suit can be based.

The plaintiff claims under a deed of gift from Ranee Kistomutty Debea, who is putneedar of a 1*a.* 3*g.* 1*c.* 1*k.* share of Kismut Bhobanund Diara, which formed part of the

* *See* Sutherland's Full Bench Rulings, p. 45.

* *See* Full Bench Decision, 8 Weekly Reporter, page 51.

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3*g*. 1*c*. 1*k*. share of the revenue-paying estate of "Pergunnah Luskurpore, &c." in Rajshahye.

We think that, as long as any portion of this estate is in existence, a plaintiff entitled to represent the zemindar has a *locus standi* in Court to claim land as forming by law part of that estate. Whether he can make out his case, or show that he is entitled to recover possession from the defendant, is another question. That question, however, has not been gone into in the present suit, the Judge having been of opinion that the plaintiff had no legal ground of action.

As we are of opinion that he had such ground, and that he had, as it were, started his case, we are obliged to reverse the judgment of the Lower Court dismissing the suit, and to remit the case for trial on its merits.

The 15th February 1864.

Present :

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Plaint—Jurisdiction.

Case No. 304 of 1863.

Regular Appeal from a decision passed by the Judge of West Burdwan, dated the 7th May 1863.

Maharajah Dheraj Mahtab Chund Bahadoor (Plaintiff) *Appellant,*

versus

Damooder Sing and others (Defendants) *Respondents.*

Mr. H. Stainforth and *Baboo Chunder Madhub Ghose* and *Moonshee Ameer Ali* for Appellant.

Baboo Kishen Sukka Mookerjee for Respondents.

A suit should not be dismissed for want of jurisdiction by reason of the plaint having been presented to the wrong Court, but the plaint should be returned for presentation to the right Court.

Campbell, J.—We think that this case has been improperly dismissed for want of jurisdiction. The Judge ought to have examined the plaint in the first instance ; and if the plaintiff had brought it to the wrong Court, should have returned it to him, in order to its being presented to the right Court, instead of which he accepted the plaint, registered it, and eight months after, finding want of jurisdiction, absolutely dismissed it. We remand the case in order to its being dealt with under the above directions, as if it were now presented to the Judge for the first time.

If (as appears to be the case) the plaint must then be taken to the Sudder Ameen, the plaintiff may still move the Judge to send for the case, and there appears to be fair grounds for such a motion.

In so far as the limitation is governed by Act XIV of 1859, plaintiff will, in regard to the proceedings now before us, have the benefit of Section 14 of that Act.

We must remark, on the disregard of the provisions of the law exhibited in this case and in many cases in many Courts in the failure, properly to examine the plaint in the first instance, and to deal with it as the law requires. We hope that the Judge will both attend to this provision himself, and enforce it on the subordinate Courts.

The 15th February 1864.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Deed—Fraud.

Case No. 164 of 1863.

Regular Appeal from a decision passed by the Judge of Nuddea, dated the 12th December 1862.

Rajender Chunder Newgee (Plaintiff) *Appellant,*

versus

Bhoobun Kalee Debea (Defendant) *Respondent.*

Mr. G. C. Paul and *Baboo Dwarkanath Mitter* for Appellant.

Baboo Baney Madhub Banerjee for Respondent.

A Court of Equity will not set aside the voluntary deed of a weak man who is not absolutely *non compos*, unless the weakness, as well as the facts surrounding the transaction, and the nature of the transaction itself, be such as to satisfy the Court that the person had not at the time a mind adequate to the business, and that he might be imposed upon, or as to the entire good faith of all the parties to the transaction.

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Jackson, J.—It is not essential that we should enquire into the question whether the consideration paid for the purchase was a fair and sufficient value, though we have some doubts upon this point. It is

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established that Kamika Persad is a man of weak intellect, liable to be imposed upon—unable, as ordinary persons, to resist undue or fraudulent influence—able to some extent to transact business, but unfitted to act without the assistance and advice of his relatives ; that he entered into the present transaction in the absence of his natural advisers, and far away from their influence, and under the influence of the enemies of the family ; that he executed this deed in favor of another enemy of the family, with whom a law-suit was pending for very large sums of money ; and that one of the conditions of the deed which is now secretly passed over, as if it was not a clause of the deed at all, was to give up this law-suit. Looking to all these facts, we think no Court of Equity can uphold any such deed, and we decline to decree specific performance of the agreement.

Story's Equity Jurisprudence in the Chapter on Fraud, though it lays down that a Court of Equity will not set aside the voluntary deed of a weak man, who is not absolutely *non compos*, still, if the weakness is such, and the facts surrounding the transaction and the nature of the transaction itself are such that the Court is satisfied that the person had not at the time a mind adequate to the business and that he might be imposed upon, and was not satisfied of the entire good faith of all the parties to the transaction, a Court of Equity will set aside that transaction. It might have been different had the plaintiff even satisfied us that, in making the purchase, he acted without knowledge of the incapacity of Kamika Persad, but we are satisfied that he was fully aware of it.

We dismiss this appeal with all costs to be paid by appellant.

The 16th February 1864.

Present :

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Sale for arrears of Revenue—Putnee—Section 37 Act XI of 1859.

Case No. 230 of 1863.

Regular Appeal from a dicision passed by Mr. James Reilly. Principal Sudder Ameen of Dinagepore, dated the 12th February 1863.

Ramchunder Chuckerbutty and others (Defendants) *Appellants,*

versus

Kashinath Moetro (Plaintiffs) and others (Defendants) *Respondents.*

Baboos Dwarkanath Mitter, Unnoda Persad Banerjee, and *Prosunno Coomar Sein for* Appellents.

Messrs. R. T. Allan and *A. F. Lingham* and *Baboos Kishen Kishore Ghose* and *Bungsee Buddun Mitter for* Respondents.

Suit laid at rupees 6,425.

Where a putnee granted by a Hindoo widow, though in appearance a duly registered tenure falling within the 3rd Exception of Section 37 Act XI of 1859, was in reality the result of a fraudulent device which, if there had been no revenue sale, the real owner or reversioner might have avoided,—HELD that the right to avoid it passed to the auction-purchaser and does not remain in the old proprietor.

Morgan, J.—THE plaintiffs in the suit below (the respondents here) are the purchasers of an estate sold by auction for arrears of Government revenue. The suit is brought against persons who have a putnee grant from the defaulting proprietor, and the question to be decided here is whether these persons' (the appellants') putnee tenure is protected by any of the provisions of Act XI of 1859 (the law relating to sales of land for arrears of revenue in Bengal). The decision of the Lower Court is in the plaintiffs' favor.

The tenure may be assumed to be a tenure of the kind described in the 3rd Exception from the 37th Section, and it has been registered under the provisions of the law. The registry is a "common registry," the effect of which is (Section 39) to secure the tenure "against any auction-purchaser at a sale for arrears of revenue" ; but this security does not, the plaintiffs contend, and we think rightly contend, affect their right, as persons wronged by the registry, to sue under Section 48 to cancel the tenure. Sheeboosoondery, who granted the putnee, was the recorded proprietor of the estate at the time of the grant. She was the widow of one Ram Govind. Ram Chunder, a nephew (brother's son) of Ram Govind, was formerly the owner of the estate. He died without children, leaving a widow Khetter Monee, who held the estate until her death ; after which in the year 1857-1264 Sheeboosoondery, upon a petition to the Collector, was recorded as the proprietor. It cannot be denied that Sheeboosoondery had no right whatsoever by inheritance or otherwise to the estate.

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She was a mere stranger and intruder, whose name the Collector allowed to be recorded as the proprietor. From 1264 she held the estate until 1268, when the putnee was granted by her; and within nine months from the creation of this tenure, the estate was sold for arrears of revenue.

Looking at present only to Sheeboosoondery's power to create such a tenure, we will notice an argument urged on the respondent's behalf that she was not such a "recorded proprietor" of this estate as the Act contemplates; those words (it was argued) being used in the Act to denote that person only who is by right the true proprietor of the estate, *and* whose name is recorded as proprietor; not an intruder who, by some chance, obtains possession of the land without right or title to the estate, and gets his name recorded. The first branch of this argument may go too far. It may be that a person is a "recorded proprietor," and competent to create a tenure within the protection of the Act, notwithstanding that he holds by a defective title. At any rate we are not required in this case to say whether a tenure created in good faith by one who believed himself to be, and who was supposed by those who dealt with him to be the true proprietor (such tenure being registered according to the Act), can be deprived of the protection of the Act by a purchaser for arrears of revenue, who succeeds in proving a defect in the title of the defaulting proprietor.

As to the other portion of the argument, we have to consider, with reference to the particular circumstances of the present case, what is the position since the act of one who, having by right no interest whatsoever, or at most only a partial and limited interest, gets his name recorded as proprietor. Is he "a recorded proprietor" within the meaning of the Act; and is a tenure created by him and apparently registered under the provisions of the Act a "duly registered" tenure entitled to protection against an auction-purchaser?

Hitherto we have not adverted to the circumstances attending the creation of this putnee tenure. It was granted by Sheeboosoondery to her brother (the defendant Ram Chunder Chuckerbutty) and to the wife of her mooktear (the defendant Rajbullub Mookerjee). By the terms of the grant, it was provided that the rents of the entire zemindaree should be collected by the putneedars who undertook that they would duly pay the Government revenue. Some small sum (about 400 Rs.) was paid to Sheeboosoondery by way of bonus; and an annual rent or profit of 60 Rs. was reserved to her. The present annual profits received by the grantees exceed 700 Rs., one-half of which or thereabouts is sufficient to pay the Government revenue. Within 11 months from the date of this grant, the putneedars made default in payment of the revenue, and the estate was thereupon sold for the recovery of the arrears. We do not more particularly notice the facts from which the Principal Sudder Ameen inferred (we think rightly) that the whole transaction was collusive, because it was conceded on behalf of the appellants that, had there been no revenue sale, Sheeboosoondery's successor might have maintained a suit to set aside this grant. The appellants, regarding Sheeboosoondery as a childless widow, with the ordinary widow's estate and powers, did not contend that the reversioner could be bound by this putnee; and Sheeboosoondery and those who dealt with her, well knowing that she was a mere intruder in possession of what really belonged to others, could not, in our opinion, by a formal compliance with the law, create a tenure binding on the true owners. But it was argued that the auction-purchaser had no right to question the grant; that he had purchased the estate subject to the putnee, and with a full knowledge of its existence; that, if the grant was invalid, still it could not be set aside at his suit, nor could he be allowed to derive any benefit by reason of its invalidity however clearly established. The rights of the purchaser are declared by the 37th Section of the law. He acquires the estate free from all encumbrances, and is entitled to avoid and annul all under-tenures, except as therein is excepted. This putnee is in appearance a duly registered tenure, falling within the 3rd Exception. But it is in truth the result of a fraudulent device which, had there been no revenue sale, the real owner or the reversioner might have avoided. If this be so, we think that the right to avoid it has passed to the auction-purchaser. Whatever is not within the Exceptions belongs to him. If any under-tenure is really defeasible, the right to make it void does not remain in the old proprietors; and if it is defeated, it falls, not for their benefit, but for the benefit of the purchaser.

This appeal is dismissed with costs.

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The 16th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Limitation—Mortgage.

Case No. 308 of 1863.

Special Appeal from a decision passed by Mr. E. F. Lautour, Judge of Patna, dated the 18th December 1862, affirming a decision passed by Moulvee Syud Sukhawut Hossein Khan, Principal Sudder Ameen of that District, dated the 5th May 1862.

Mussamut Mohasha and others (Plaintiffs) *Appellants,*

versus

Mussamut Khoonoo and others (Defendants) *Respondents.*

Mr. C. Gregory and *Baboos Onookool Chunder Mookerjee* and *Kishen Succa Mookerjee* for Appellants.

Messrs. G. Gregory and *J. Baptist, Moonshee Ameer Ali,* and *Baboo Unnoda Pershad Banerjee* for Respondents.

Possession by mortgagees cannot be adverse to the heir of the deceased mortgagor so as to make limitation apply.

Kemp, J.—The plaintiff in this case is an auction-purchaser of the rights and interests of Ahmed Buksh. This suit is to redeem a mortgage alleged to have been made by the ancestor of Ahmed Buksh some 122 years ago.

Both the Courts have dismissed the claim of the plaintiff holding it to be barred, because Ahmed Buksh did not assert his right of redemption within twelve years from date of decease of Gous Buksh.

It is admitted that the mortgaged estate became vested in Gous Buksh. The question of who is the heir of Gous Buksh has not been tried, and we have not been shewn that the widow of Gous Buksh, Mussamut Hosseinee, has been in possession, or that her name has been registered as proprietress of this property. It is clear from the arguments and admissions of the pleaders that possession has all along been with the mortgagees. Such possession would not be adverse to Ahmed Buksh as heir of the mortgagor, and the Statute of Limitations will therefore not apply. The case must be remanded for trial on the merits which opens out the question of who is the heir of the original mortgagor. Cost to follow the result.

The 16th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Vakeel—Joinder—Limitation.

Case No. 1674 of 1863.

Special Appeal from a decision passed by Mr. W. H. Brodhurst, Judge of Sarun, dated the 18th September 1863, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 2nd October 1861.

Rajah Perladh Sen Bahadoor (Defendant) *Appellant,*

versus

Runjeet Roy (Plaintiff) *Respondent.*

Baboos Kalee Mohun Doss and *Hem Chunder Banerjee* for Appellant.

Baboos Sreenath Doss and *Debender Narain Bose* for Respondent.

Although on an account for work and labor, goods sold, and debt, each of the different items would originally have constituted a cause of action, still as they accumulate, th y may be and generally are combined in one cause of action on one homogeneous account.

Where no law, special custom, or agreement is shown, making the remuneration on a joint contract for labor to be done payable in advance, the cause of action accrues from the time when the labor was performed.

Campbell, J.—In this case plaintiff, having been employed as a vakeel in 29 different cases, sued for remuneration after allowing for certain payments in account. He puts in evidence 29 vakalutnamahs which do not stipulate any particular remuneration, but he claims the customary rate. He obtained a decree in the Court of the Principal Sudder Ameen, confirmed by the Judge.

In special appeal, the pleader for appellant relies

1st.—On a ruling in Case 2186 of 1862 in which a Bench of this Court (Justices Levinge and Roberts) decided that different causes of action cannot be joined together, so as to bring the amount within the jurisdiction of a Court superior to that in which each cause separately would have been tried.

2nd.—On the argument that the cause of action arises from the date of execution of each vakalutnamah, and in that view much of plaintiff's claim is out of time.

We think it very doubtful whether we should concur in the ruling of the Bench of this Court above quoted, but we do not think it necessary to go into the point in this case, because we are clear that plaintiff is entitled to treat his whole claim as a single cause of action for work and labor done,

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the 29 powers being only exhibits and evidence in the case. Although on an account for work and labor, goods sold, and debts, each of the different items would originally have constituted a cause of action ; still as they accumulate, they may be and generally are combined in one cause of action on one homogeneous account. Such an action is the present, and we think that there is no defect of jurisdiction.

With respect to the limitation, defendant cannot show that there is any law, special custom, or agreement making the remuneration on the general contract for labor to be done payable in advance. We must, therefore, treating the matter simply as a contract for labor, consider with the Judge that the cause of action accrued from the time when the labor was performed, *i. e.* from conclusion of the suits in respect of which the labor was given.

We dismiss the special appeal with costs.

The 17th February 1864.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Will—Construction.

Case No. 275 of 1863.

Regular Appeal from a decision passed by the Judge of 24-*Pergunnahs, dated the* 10*th December* 1861.

Meer Hoomayoon Jah (Plaintiff) *Appellant,*

versus

Towfeekinnissa Begum and others (Defendants) *Respondents.*

Messrs. J. Cochrane and *H. Stainforth* and *Baboo Juggodanund Mookerjee* for Appellant.

Baboos Kishen Kishore Ghose and *Khetter Mohun Gangooly* for Respondents.

Construction of a will and the meaning to be attached to certain words used therein relating to real and personal property.

Loch, J.—THIS is an appeal on the construction to be put on certain words in a will executed by Shazadah Mahomed Sooltan Yasen, bearing date the 19th April 1848, in favor of the plaintiff, his grand-son by his daughter Khosroo Begum. The contention to which we shall confine ourselves is whether any thing beyond personalty is conveyed to the plaintiff by the will, or whether the words used are sufficient to convey the real and personal property of which the testator was possessed at the time of his death.

In support of the view taken by the plaintiff, his Counsel, Mr. Cochrane, has put before us a number of decisions by the Courts in England, showing that where a testator makes use of such words in his will as "whatever I may die possessed of," or "all I am worth," or "all I possess in any way belonging to me," and the like, such words are sufficient to convey the whole real and personal property to the party designated ; and that such words as "goods and chattels," even, when connected with the restrictive word *videlicet*, are not sufficient to control the foregoing declaration, but can only be looked upon as a mere enumeration of property ; and among other cases he quoted two decisions, one from VIII Viner, page 295, Sir Brooke Brydges, and the other from VIII Vesey, p. 26, which no doubt completely supported the view of the case he had taken.

Had the intention of the testator in the present case been expressed in any terms similar to those quoted in the decisions alluded to by the learned Counsel, we should have had great hesitation in taking any other view of the testator's meaning than that so frequently applied to such words by the Courts in England. But we are not put in this position, for we have before us a Persian will, an imperfect translation of which is in the hands of the plaintiff's Counsel. That will states as follows :—"Of my real property (imlak), I have given to my children and grand-children whatever I have considered it right and proper to give of my own will and pleasure, and have put them in possession and enjoyment of the same. Now, whatever cash or goods belonging to me, the testator, are forthcoming, or may accumulate hereafter, it is proper that, after my death, after deducting whatever I have given in the way of gift or present to Khosroo Begum and Hoomayoon Jah during my life-time, the remaining things (bakee cheezra) should be made over to, and be enjoyed by, my said daughter's son, *viz.* Hoomayoon Jah ; and if my said grand-son fail to arrive at majority during my life-time, the superintendent will make over my property (mutrooka) to the parents of the aforesaid executor, and will take a receipt from them."

There can be no doubt that the testator makes mention of two classes of property in the above words, real under the title of *imlak*, personal under the title of *nukd* and *jins*. He says first of all, I have divested myself of my

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real property during my life-time. Now, he goes on to say, I arrange for my personal property, and uses these words, "Allhal nurchi az nukd o jins muni moosi mowjood ast." Now (or at present) whatever money or goods belonging to me, the testator, are in hand or forthcoming, these he makes over to Hoomayoon Jah. Nor can any stress be laid upon the word *mutrooka*, which is used below, because that word means only the estate of a deceased person, and may consist of real and personal property, or of real property only, or of personal property only. And further the word "cheez" clearly indicates that the testator was speaking of personalty only. We think, therefore, that the Lower Court has put a right construction on the will, and we accordingly affirm the decision, and dismiss the appeal with costs.

The 17th February 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Jurisdiction—Sureties—Contribution.

Case No. 310 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, dated the 5th December 1862.

Nuro Narain Doss and others (Plaintiffs) *Appellants,*

versus

Brojo Mohun Doss (Defendant) *Respondent.*

Baboos Bhoobun Mohun Roy and *Kishen Succa Mookerjee* for Appellants.

Baboo Luckhee Churn Bose for Respondent.

Suit laid at rupees 30,250.

If one of several co-guarantors, on the default of the principal, pays the whole debt or more than his proportion of it, he may recover for such excess above his proper share by contribution from the others.

An action by one guarantor against his co-guarantors will lie where a single guarantor has paid the debt; and it is not necessary, in order to maintain such an action, to show that the liquidating guarantor had previously applied to or proceeded against the principal with a view to recover the debt from him.

Steer, J.—THE plaintiffs became security for Narain Doss Mohapattur to Government for the rents of a farm leased to him. The plaintiffs were not the only sureties, as the defendants Brojo Mohun Doss and others had previously tendered their property as security for the farmer, but this security not being sufficient, the present plaintiffs tendered other security, and it was accepted. Thus all the securities were answerable as far as the property they had severally pledged for the whole amount of their principal's defalcations, but they were not jointly and severally liable. Subsequently, the farmer defaulted, and the property of the plaintiffs was attached and sold for 14,225 rupees to recover the arrears due from him. The plaintiffs accordingly bring this suit against the farmer, whom they hold primarily answerable in the whole sum, and against the co-sharers each in his due proportion, in case the debt is not recoverable from the farmer.

The sureties all denied any liability to contribute, one and all urging that no action could lie against them on the behalf of their co-surety under their respective contracts.

The Principal Sudder Ameen, referring to the principles of Hindoo and Mahomedan Law in regard to sureties, considers that the securities are not liable to their co-surety, and accordingly exonerates them, and he decrees the claim against the farmer defendant only.

The plaintiffs appeal, and we think their appeal must be decreed.

It is freely admitted that, had the sureties entered into a joint contract in one and the same document, then the action of the plaintiff, to compel his co-securities to contribute towards the payment of the debt of their principal, would lie; but where, as in the present case, each security has bound himself by separate deed, making himself liable for the whole debt, and none of the securities knows of the action or the contract of the other securities, the action, it is argued, will not lie on the part of one security against another.

No authority is shewn us in support of this view, and it is clearly an unsound one. In Story's Law of Contracts, 4th Edition, Volume II, page 445, it is laid down that, "if there be several co-guarantors, and one "of them, on the default of the principal, "pay the whole debt or more than his pro-"portion of it, he may recover for such "excess above his proper share. He can "claim contribution in such cases, both in "law and equity. Nor does it matter in "this respect whether the sureties are "jointly and severally bound or only se-"verally, nor whether they are bound by "the same instrument or by different in-"struments, nor whether they knew of each "other's engagements or not, provided their "obligations be in respect of the identical

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"debt. This doctrine stands upon the "equitable ground that the payment of the "same debt by one surety enures to the "benefit of all."

This passage, it will be seen, meets the whole argument of the pleader for the respondent in regard to this point, and nothing more need be said upon it.

Another objection to the action is that, inasmuch as by the form of action adopted by the plaintiff, the liability of the sureties does not arise until after endeavors have failed to recover the debt from the principal, the cause of action against the securities has not yet arisen, inasmuch as proceedings against the principal have yet to be instituted. But it is clear that the action by one guarantor against his co-guarantors will always lie where the single guarantor has paid the debt, and it is not necessary, in order to maintain such an action, to show that the liquidating guarantor had previously applied to, or proceeded against, the principal with a view to recover the debt from him. The mere circumstance of the plaintiff including the principal in the suit, and asking only for an alternative decree against the sureties in case he fails to recover the debt from the principal, does not render his action against the securities the less tenable ; nor has any inconvenience or injury been occasioned to any party by the peculiar form in which the plaintiff has brought his action. If it was at the option of the plaintiff, to sue only his co-sureties, the latter cannot complain that the plaintiff has done his utmost, by holding the principal primarily answerable to him, to lessen the liability of his co-securities, We think, therefore, this second objection also untenable.

The Lower Court has allowed the plaintiff interest, but this is only against the farmer. As no demand was made by the plaintiff upon his co-securities, and we hold he should have demanded contribution from them if he intended to hold them responsible to him for not paying it, we think he is not entitled to claim any interest from his co-securities, though he is entitled to claim it against the principal against whom the Lower Court has in fact awarded it.

There only remains to consider one more point in this case.

One of the securities sued in this action, viz. Mussamut Nundodora, is the wife of the defaulting farmer. The plaintiff says that the property ostensibly pledged by her was, in fact, the benamee property of her husband. The wife denies this and avers that it was her own *streedhun*. The property has been sold for the arrears of the farmer, and the question raised is are the proceeds to be considered as belonging to the farmer, or to his wife. On this point there is no evidence which enables us to pronounce any opinion, and it may, without inconvenience, be left to be settled when the decree comes to be put into force. If the property referred to was, in fact, the property of the wife, so much of the money relized by the sale of it, as is equal to what would be plaintiff's contribution to her on account of such payment, must of course be allowed as a set off against the plaintiff's claim of contribution from her ; but if on the other hand the property was, in fact, the benamee property of the farmer, his wife has no right to be credited with the sale proceeds of it as a contribution on her part towards the payment of the debt of the farmer, for the money is not hers, but her husband's.

The appeal is decreed in favor of the plaintiff, and he is entitled to obtain his costs from the defendants, in proportion to the amount of claim decreed against each respectively, the defendants bearing each his own costs.

The 17th February 1864.

Present:

The Hon'ble H. V. Bayley and L. S. Jackson, *Judges.*

Hindoo Law of Inheritance—Adoption—Step-mother.

Case No. 364 of 1863.

Regular Appeal from a decision passed by the Judge of Rajshahye, dated the 18th February 1863.

Kasheeshuree Debia (Plaintiff) *Appellant,*

versus

Greesh Chunder Lahoree (Defendant) *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Onookool Chunder Mookerjee for Respondent.

Suit laid at rupees 2,00,965-15-9.

On the death of a son adopted by a Hindoo as the son of one of his two wives, the property descends, not to the other wife, but to the next legal heir.

Bayley, J.—In this case plaintiff Kasheeshuree, alleging herself to be the first wife of one Kalee Kant, sued in 1268 for the reco-

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very of the property, real and personal, left by Saroda Pershad, on the allegation that it reverted to her as legal heir on the demise first of Mon Mohinee Debia, the second wife of Kalee Kant, then of Saroda Pershad, the adopted son of Kalee Kant. Plaintiff also sued for *streedhun*, and she averred dispossession by defendants on the 10th Joysto 1266. Plaintiff added that a will purporting to give her a maintenance was spurious. Further, plaintiff in her written statement alleged that the adoption of Saroda Pershad was done without plaintiff or Mon Mohinee joining their husband in the act. Her claim now is as mother of the adopted son.

The defendant, a nephew of Kalee Kant, appears and claims as next heir to Saroda Pershad, and answers that Kalee Kant adopted Saroda Pershad as the son of his *second* wife Mon Mohinee, and that Kalee Kant stated to the Judge by petition, and generally on other occasions, that Saroda Pershad was adopted by him *and* by his second wife Mon Mohinee, that the first wife was by a good and valid will left a maintenance, and that defendant had not dispossessed plaintiff of any *streedhun*.

The Judge held that Kalee Kant, by the will and various acts, was proved to have adopted Saroda Pershad as the son of his *second* wife Mon Mohinee, and that consequently plaintiff's claim, as mother of the adopted son, was invalid. He therefore dismissed her suit for the property of Saroda Pershad, referring her to a separate action for her *streedhun*.

Plaintiff appeals from this decision, and her contention here is one of law, and not upon the facts. It is that both wives under Hindoo Law are equally adoptive mothers; and, as such, both or the survivor are entitled to inherit before a nephew, and that, as survivor of the two wives in this case, she is the legal heir to the property of Saroda Pershad.

Judgment.

We are of opinion that this position has not been borne out by Hindoo Law books or precedent. As to the former there have been cited to us Colebrooke's Hindoo Law, Volume III, page 100, and Strange's Hindoo Law, Volume I, page 87, Macnaghten, Volume II, page 62, S. D. A. Rep. 30th July 1859, page 1,099, Ditto Select Reports, Volume II, page 27, 4th August 1812. The passage relied upon from Colebrooke is, with reference to the use of the singular *janani* to denote the natural, and *matarah* the plural of *matri* to denote step-mothers; and where there are these words used accidentally, "Vachespati Misra expounds 'on failure of him,' on the death of the father; 'natural mother' (*janani*) she who has a son; 'mothers' (*matarah*) step-mothers who have no male issue: all these shall have equal shares with the sons." But this text does not apply to the facts of this case. Those facts are that the father Kalee Kant did adopt the son for Mon Mohinee only, and therefore the boy is her adopted son; and on her death, his property would go by Hindoo Law, not to a step-mother, but to the next legal heir, such as the nephew is here. To the passage from Strange relied on by appellant, the above remark equally applies, and it may be added that it is clear (*vide* Chapter 4, Section 1, pages 97-8, Ed. 1830) that, in stating that the adopted son is son to both adopting father and mother, it is intended to say son to that mother as whose adopted son he is taken. The case in Macnaghten in no way assists appellant's case, but rather the contrary. Of the two decisions cited, that of 1812, among others, rules (not touching this case) that the adopted son of a widow succeeds to her peculiar property, and the case of 1859 rules that the relatives of an adoptive mother inherit the property of her adopted son, just as they would have succeeded to a natural-born son. But the appellant in this case is, on the facts found and proved, not the adoptive mother, but the second wife was so.

Under this view of the case, we see no reason to decree this appeal, and we accordingly dismiss it with costs.

The 18th February 1864.

Present:

The Hon'ble W. Morgan and L. S. Jackson, *Judges.*

Putnee (sale of)—Rights of purchaser — Surety—Contribution.

Case No. 1540 of 1863.

Special Appeal from a decision passed by Mr. J. E. S. Lillie, Officiating Judge of Hooghly, dated the 27th February 1863, reversing a decision passed by the Moonsiff of that District, dated the 15th December 1862.

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Obhoy Chunder Bundopadhya (Defendant) *Appellant,*

versus

Nilambur Mookerjee (Plaintiff) *Respondent.*

Baboos Hem Chunder Banerjee, Khetternath Bose, and *Chunder Madhub Ghose* for Appellant.

Baboos Poorno Chunder Mookerjee and *Bany Madhub Banerjee* for Respondent.

The purchaser of the rights and interests of a putneedar in a putnee talook sold for arrears of rent purchases the talook subject to whatever claims the zemindar has against it for rent, and has no claim against the surety of the putneedar by reason of the name of the latter appearing as the owner of the talook in the zemindar's papers or otherwise. He may sue the other sharers for the money which he has paid on their account.

Morgan, J.—THE special appellant (the defendant in the suit) was surety for a Government tehsildar who made default, and the rights and interests of the special appellant in a putnee talook, pledged by him as security, were sold by the Collector, and bought by the special respondent (the plaintiff in the suit) on the 1st Bysack 1262. The zemindar applied on the same day, under Regulation VIII of 1819, for the sale of the putnee for arrears of the past year due to him, and the special respondent paid the amount to save the talook from sale. He brought this suit to recover the amount thus paid by him. The Court of first instance dismissed the suit, holding that he had no claim against the defendant in respect of this payment, whatever claims he might have against other persons, co-sharers in the talook, for contribution in proportion to the amount of their shares. The Court did not, as the Lower Appellate Court supposes, hold that the suit could not proceed without the co-sharers as defendants.

The Lower Appellate Court reverses this decree, because "the defendant's name was the only name used in the records of the zemindar, and he is liable for the arrears."

This suit is not by a zemindar against his putneedar for arrears, but by a purchaser of the interest of the latter; and the question is what did he really purchase and pay for. The respondent bought the appellant's *rights and interests only* in the talook which have since been ascertained to extend to a four annas share of it. He bought that share subject to whatever claims the zemindar had against it for arrears of rent. Having bought property subject to an incumbrance, he now seeks to impose on the defendant the burthen of discharging that incumbrance. Looking to the time and circumstances of his purchase, it is highly improbable that the true state of things was unknown to him, or that he would take for granted on the 1st Bysack that the zemindar's rent for the year which ended the previous evening had been fully paid, or that he would make no enquiry concerning it before bidding for the talook. We assume now that he purchased on that day, having no knowledge of the zemindar's application under Regulation VIII of 1819.

We think that the respondent bought the share subject to this charge, and that *he* has no claim against the appellant by reason of the name of the latter appearing as the owner of the talook in the zemindar's papers or otherwise; and that he may sue the other sharers for the money which he has paid on their account. We therefore think that the decision of the Court of first instance was correct, and that the decision of the Lower Appellate Court should be reversed.

An objection was made in a very late stage of the argument that, by Section 27 Act XXIII of 1861, the right of special appeal was taken away in this case. This suit is not for money due either "on bond or other contract," and is not otherwise of a nature cognizable under Act XLII of 1860. The right of special appeal is therefore preserved.

Decree for the special appellant with costs.

The 18th February 1864.

Present:

The Hon'ble G. Loch and J. P. Norman, *Judges.*

Alluvial Land—Clause 3 Section 4 Regulation XI. 1825.

Case No. 324 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 14th March 1863.

Khellut Chunder Ghose (Plaintiff) *Appellant,*

versus

The Collector of Bhaugulpore and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Huro Kallee Ghose* for Appellant.

Baboos Kishen Kishore Ghose and *Jugodanund Mookerjee, Moonshee Ameer Ali,* and *Mr. J. Baptist* for Respondents.

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Suit laid at rupees 6,224-9-9.

The words "at the disposal of the Government" in Clause 3 Section 4 Regulation XI. 1825 mean that the property in and absolute right of disposal of the land is vested in the Government, and not that the Government has merely a right to the revenue.

Norman, J.—THIS is a suit for the possession and settlement of 19,500 beegahs of land in Dearah Teentunka, Pergunnah Colgong, claimed by the plaintiff as having accreted on the sites of his diluviated lands; that the Dearah was resumed by the Government under resumption proceedings of the Special Commissioner, dated the 28th of April 1846; that the Government in 1847 settled the lands with the defendant Muddun Thakoor for one year, subsequently let them to him in ijarah for ten years from 1848, and again for 15 years from 1858 to 1874; that his prayer to the Sudder Board having been rejected in April 1860, his cause of action accrued; and that his cause of action is three years from the date of the final order of the Sudder Board.

The case was dismissed by the Lower Court on the ground of limitation. The plaintiff appeals.

Assuming that the plaintiff's cause of action is that the Government after resumption refused to settle the Dearah with him, we are of opinion that it discloses no cause of action.

Regulation XI of 1825 was passed for determining claims to lands gained by alluvion, and recites that Courts of Justice have sometimes found it difficult to determine the rights of litigant parties claiming churs or other land gained in the manner therein described. By Section 4 Clause 1 lands gained, by gradual accession from the recess of a river or the sea, are to be considered as an increment to the tenure of the person to whose land or estate they are annexed. By Clause 2, when a river by a sudden change of its course may break through and intersect an estate, the lands so separated, being clearly recognised, shall remain the property of the original owner. By Clause 3, when an island may be thrown up in a large navigable river, &c., and the channel of the river between such island and the shore may not be fordable, it shall, according to established usage, be at the disposal of the Government.

We are of opinion that the words "at the disposal of the Government" mean that the property in and absolute right of disposal of the same is vested in the Government, and not, as contended for the appellants, that the Government have merely a right to the revenue. The Legislature throughout the Regulation in question is dealing with the right of property in newly formed lands, and not merely providing for the right to assess revenue upon them. The appellant's vakeels further contended that, in analogy to cases under Regulation VII of 1822 of the resumption of invalid lakheraj, they had a legal or equitable right to assessment, notwithstanding that the Government had resumed, and they referred to Huree Ram Bukshee *versus* Ram Chunder Banerjee, S. D. A. Rep. 15th August 1850, page 407, and S. D. A. Summary Reports, page 131, Huro Gobind Ghose's case. But these cases are widely distinguishable. In the case of the resumption of lakheraj, the Government does not acquire any proprietary right in the soil, but merely asserts and establishes its title to the revenue. *See* Regulation II of 1819 Section 3 Clause 1, and Regulation VII of 1822 Clause 15.

Assuming that the plaintiff claims any proprietary right in the land as against the Government and Muddun Thakoor, as being an accretion on the site of his own land, and not a Dearah or island separated from the shore by unfordable water, his right of action accrued at latest in 1847, and is therefore barred by limitation.

We therefore dismiss the appeal with costs and interest.

The 19th February 1864.

Present:

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

Pre-emption—Hindoos.

Case No. 1974 of 1863.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Officiating Additional Judge of 24-Pergunnahs, dated the 29th June 1863, affirming a decision passed by Roy Tarucknath Sein, Principal Sudder Ameen of that District, dated the 23rd December 1862.

Moonshee Hubeebul Hossein (Defendant) *Appellant,*

versus

Lalla Dewkee Nundun (Plaintiff) *Respondent.*

Messrs. C. Gregory and *R. E. Twidale* for Appellant.

Baboos Mohesh Chunder Chowdhry, Dwarkanath Mitter, Unnoda Pershad Banerjee, Chunder Madhub Ghose, Hem Chunder Banerjee, Mohendro Lall Shome, Taruck-

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nath Sein, and *Banee Madhub Banerjee* for Respondent.

Where a Mahomedan claims pre-emption against a Hindoo under Mahomedan Law, there must be a distinct plea of custom as a plea of fact.

Bayley, J.—In this case plaintiff, as a Hindoo purchaser of a house previously leased and adjoining to a house belonging to defendant, Hubeebul Hossein, a Mahomedan, sued for possession of the house and land.

Defendant pleaded a right of pre-emption under Mahomedan Law, on the ground of vicinage and inconvenience to the females of his family by strangers occupying the next one.

It may be here observed that there was a cross case in which Hubeebul Hossein as plaintiff sued to establish his right to pre-emption, and claimed to retain on that title the possession of the house which he then held as lessee, and the proprietor and purchaser were made defendants.

Both suits were tried together.

There was also a plea by Hubeebul Hossein that he had a promise from the proprietor of a perpetual lease.

The first Court held that the law of pre-emption did not prevail in such a case as this, and that the inconvenience alleged by Hubeebul Hossein did not exist, and dismissed Hubeebul Hossein's claim for the right of pre-emption.

The Judge, on appeal, found, as a fact, that Hubeebul Hossein was not a perpetual lessee, but only a tenant-at-will. He proceeds :—"Then, as to the right of pre-emption which he claims, there can be no doubt, "after a consideration of the cases cited on "both sides, that the right of pre-emption is "not a right which obtains in Bengal, where "a Mahomedan claims it against a Hindoo "as in this case." He accordingly dismissed the appeal.

In the special appeal by Hubeebul Hossein here, it is argued that the right of pre-emption can be claimed in this case as a custom, and the decision of five Judges of the 28th September 1863* is cited to support the plea.

That decision, we may remark, did not rule that, by Mahomedan Law, the right of pre-emption existed in cases of Mahomedans against Hindoos, but that, where the custom of pre-emption had been adopted between Hindoos, based on the provisions of Mahomedan Law, effect would be given to the custom. But in this case, there is no distinct plea of custom as a plea of fact. The whole contention below was in reality on the right of a Mahomedan to have pre-emption against a Hindoo under Mahomedan Law. It is only here at this last stage, in special appeal, that the custom as a fact, and as between a Mahomedan and a Hindoo, is pleaded, and we cannot now admit it, as it should have been pleaded as a fact below.

On this ground we reject this special appeal with costs.

* *See* Sutherland's Full Bench Rulings, p. 143.

The 19th February 1864.

Present:

The Hon'ble G. Loch and J. P. Norman, *Judges.*

Mortgage—Redemption (by purchaser of portion of the mortgaged property).

Case No. 1121 of 1863.

Special Appeal from a decision passed by Mr. E. F. Lautour, Judge of Patna, dated the 17th January 1863, reversing a decision passed by Moulvie Syed Sukhawut Hossein, Principal Sudder Ameen of that District, dated the 16th June 1862.

Moulvie Razeeooddeen *alias* Syed Hossein (Plaintiff) *Appellant,*

versus

Jhubboo Sing and others (Defendants) *Respondents.*

Messrs. G. and *C. Gregory* for Appellant.

Baboo Greesh Chunder Ghose for Respondents.

A mortgagee is entitled to hold possession till every pice of the mortgage debt has been fully paid; and no person representing the original mortgagor, and claiming any fractional portion in the mortgaged property, can sue to redeem his separate share without proof of the satisfaction of the entire debt.

Loch, J.—This was a suit to recover possession of a share of a mortgaged property, on the allegation that the amount of the loan due on that share had been paid realized from the usufruct. The Judge in the Lower Appellate Court, for reasons assigned by him, held that the plaintiff was not entitled to recover unless he paid the money, and he reversed the order of the first Court in favor of the plaintiff.

We see no ground for interfering with the decision of the Judge, for we consider the case to have been brought in an incomplete form, and that, if the plaintiff wished to gain possession of his share of the property

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mortgaged by him and others for security of a common debt, he was bound to show distinctly that the whole of that debt had been paid off, for a mortgagee is entitled to hold possession till every pice of the debt secured by the mortgage has been fully paid and satisfied, and no person representing the original mortgagor, and claiming any fractional portion in the mortgaged property, can sue to redeem his separate share without proof of the satisfaction of the entire debt.

We dismiss the appeal with costs. This decision will not prevent the plaintiff from bringing a fresh suit in a proper form.

The 19th February 1864.

Present:

The Hon'ble G. Loch and J. P. Norman, *Judges.*

Arbitration.

Case No. 1251 of 1863.

Special Appeal from a decision passed by Moulvie Syud Imdad Ali, Principal Sudder Ameen of Tirhoot, dated the 21st February 1863, *reversing a decision passed by Moulvie Mahommed Natiq, Moonsiff of that District, dated the 22nd November* 1862.

Bahal Singh and others (Defendants) *Appellants,*

versus

Shibo Ram Singh and others (Plaintiffs) *Respondents.*

Mr. A. F. Lingham for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondents.

A submission of private arbitration may be perfectly valid, though not put in writing, and a private award made in pursuance of such submission will be respected and treated as valid by the Courts if duly performed and the possession of the contested property be held under them. The arbitrators may be competent to prove, as well the submission as the making of the award, though no ikrarnamah was ever executed.

Norman, J.—THIS case must be remanded to the Lower Court for a trial of the issue, whether arbitrators were appointed and an award made, and whether such award was performed wholly or in part by the party in whose favor it was made, obtaining and retaining possession of the share awarded to him in pursuance of it.

The Principal Sudder Ameen seems to think that, because there was no submission in *writing*, and no mention of the award by the Court, that the award was, therefore, invalid.

But we may observe that a submission of private arbitration may be perfectly valid, though not put in writing, and a private award made in pursuance of such submission will be respected and treated as valid by the Courts if duly performed and the possession of the contested property be held under them. (*See* Regulation VI of 1813 Section 3 Clause 3.) The arbitrators may be competent witnesses to prove, as well the submission as the making of the award, though no ikrarnamah was ever executed.

As the defendant did not take up the ground of limitation before the Lower Appellate Court, we think it is no ground of special appeal that the Lower Appellate Court did not come to a finding on any issue as to the point of limitation.

The 20th February 1864.

Present:

The Hon'ble H. T. Raikes and W. S. Seton-Karr, *Judges.*

Mesne Profits—Specific performance.

Regular Appeals from a decision passed by the Judge of Jessore, dated the 27th April 1861.

Case No. 360 of 1863.

Rajah Protap Chunder Singh (Plaintiff) *Appellant,*

versus

Gooroo Doss Roy and others (Defendants) *Respondents.*

Baboos Kishen Kishore Ghose, Onookool Chunder Mookerjee, and *Dwarkanath Mitter* for Appellant.

Mr. R. T. Allan and *Baboo Juggodanund Mookerjee* for Respondents.

Suit laid at rupees 42,891-4.

Case No. 361 of 1863.

Rajah Protap Chunder Singh (Plaintiff) *Appellant,*

versus

Chunder Coomar Roy and others (Defendants) *Respondents.*

Baboos Kishen Kishore Ghose, Onookool Chunder Mookerjee, and *Dwarkanath Mitter* for Appellant.

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Baboos Romanath Bose, Kalee Kishen Sein, and *Poolin Beharee Sein* for Respondents.

Suit laid at rupees 14,679-9.

The result of a long pending litigation was that the defendants were directed to pay wasilat for certain lands which they had possessed under an invalid lakheraj claim. They subsequently entered into a compromise with the plaintiff their zemindar and agreed that, if they defaulted in rent, or if the lands became khas of the zemindar, or were by any means to be alienated, the defendants would point out the lands, or, on failure to do this, pay damages for the loss of the same. HELD that lapse of time and surrender of the lands were no impediment to the Court granting relief to the plaintiff in the shape of a decree for specific performance.

Seton-Karr, J.—THE litigation out of which these two appeals arise, will be found very fully detailed in the Sudder Decisions for 1848, page 568. The issue of that long contest was that the respondents in the present cases, then defendants, appellants, were ordered to pay *wasilat* for certain lands which they had possessed under an invalid lakheraj claim. The wasilat was to be paid at the rate of rupee 1-14 per pakhee, and amounted to rupees 1,608 a year on about 83 khadas of land.

After this the defendants entered into a compromise with the plaintiff, who is the zemindar of Pergunnah Nuldee, and agreed, on the 30th of Choitro 1256, that, if they defaulted in rent, or if the lands became khas of the zemindars, or were by any means whatsoever to be alienated, they, the defendants, would point out the lands, or, if they failed to do this, would pay damages for the loss of the same.

Subsequently the plaintiff sued the defendants for rents before the Principal Sudder Ameen, and both that Court and the Judge's Court dismissed the claim, mainly because the Judges held that the defendants had regularly tendered their resignation of the lands in dispute, and were, consequently, not liable for rents.

The plaintiff still dissatisfied and unable to obtain his rents or any such compensation as the highest Court had awarded to him; and as the defendants had themselves agreed to make, now sues the defendants in two separate suits, alleging in the *first* suit that the terms of the compromise have been violated; and in the *second*, that 500 beegahs or some khadas of land have been unfairly demarcated by the survey authorities, in favor and at the instance of Ram Ruttun Roy now represented by Chunder Coomar Roy.

The Judge has dismissed the claim against Gooroo Doss Roy, holding that the plaintiff ought to have sued out execution on the decree of the Sudder Dewanny of 1848 and the compromise of 1256 or 1850; that the plaintiff has not shown that the conditions of the agreement or compromise have been infringed; and that the Zillah decisions of 1854 above adverted to have become final in appeal. In the other suit, the Judge rules that the plaintiff has filed no proof of his possession at any time within 12 years before suit, and that the separate defendants, Gooroo Doss and others, were not shewn to have been in possession as the ryots of Ram Ruttun, and as accountable to the plaintiff as zemindar.

In the first appeal before us, the point at issue is mainly whether the Zillah decisions alluded to are final and conclusive between the parties, looking to the liability clearly and admittedly imposed on the defendant, Gooroo Doss, by the compromise of 1256 and its terms. The case is practically one brought to compel the defendant to discover the lands on which *wasilat* has been declared to be due, and it is urged that the defendant must be held bound either to discover the same according to his contract, or to show indisputably that his liability to do this has legally been avoided.

Now on this point we first heard the pleader for the appellant, and having regard to all the facts disclosed by the litigation, to the decree of the Sudder Court in his favor, and to the specific terms of the compromise, we thought the case set up for him so strong that we called on the respondent's pleader to support the order of dismissal, and having heard him at great length, we are of opinion, after very full consideration, that he fails to show grounds for our confirmation of the order of the Court in his favor. In the first place we cannot take the Zillah decision of 1854 (page 29 for April) to be final and conclusive for anything but the relinquishment of the lands by the defendant Gooroo Doss. We cannot accept it as conclusively establishing that the defendants had formally done that which they were bound to do, *viz.*, had, as tenants or lessees of the plaintiff, pointed out the lands to him. We do not think that the words at the close of the Judge's decision amount to a judicial finding of possession by the plaintiff as zemindar through one Mirtoonjoy, who at first had taken a farm from the defendants; and we can take the decision as only establishing the fact that the defendants had formally tendered their resignation of the lease of the lands, and as nothing more. The rejection of an application for special appeal on the part of the plaintiff

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does not mend matters for the respondent before us, neither does it settle anything save that there was no point of law arising on which the late Sudder Court could think fit to interfere.

Seeing, then, that we hold the issue of the case of 1854 to be only an ostensible vacation of the lands by the respondents, we observe that Mirtoonjoy was a tenant of a near relation of the respondents, and it was for the respondents to call and examine him as witness in this case if they wished to establish the fact of plaintiff's possession through him by receipt of rents. But this they have never done, though the present case was pending for 2½ years in the Lower Court, and we cannot assume, as already remarked, from anything disclosed by any part of the litigation, that the plaintiff has at any time accepted another tenant, and thereby relieved the respondent from his self-imposed liability of discovering to the plaintiff the lands to which this person has been held entitled.

Another argument much pressed by Mr. Allan was that, as the plaintiff has taken six years to sue since the decision of 1854, a Court of Equity should be reluctant to give him relief in the shape of a decree for specific performance, and that the respondents, owing to lapse of time and surrender of the lands, would be quite unable to identify and point out the same. But we observe that the analogy of English Law relied on by Mr. Allan does not apply, for there is no other tribunal or Court to which we could refer a plaintiff kept out of his rights by the prolonged opposition of his antagonists, as this person has been, for some other mode of vindicating his position. Law and equity are with us administered under one system and in one Court. And as the suit is brought for specific performance, and as we are fully competent to attach a penalty for failure to comply with any order, we may think fit to give for such performance, we see no reason for interposing any further delay or obstacle in the plaintiff's way to recover his unquestionable rights.

As regards inability to identify the lands, we remark that the evidence adduced for the defendants, though not satisfactory nor sufficient to establish any possession in the plaintiff's part through Mirtoonjoy, still shows that the lands are capable of identification, for the witnesses themselves say that they know them, and it is unreasonable for the defendants to call on the plaintiffs, or on any other parties, to identify lands of which the defendants were once themselves in peaceable possession for a very long series of years, and with the boundaries of which they must be perfectly familiar. Neither do we see any necessity for remanding the case for the deputation of an Ameen to the spot, for an Ameen would ultimately be dependent on evidence to be furnished by the respondents, and they and not an Ameen are the persons who must be called on to point out the lands to the plaintiff, and to carry out the Court's orders and the terms of the compromise.

Indeed, if the defendants were to persist in refusing to show the lands to any Ameen intermediately proceeding to the spot, it does not appear how such a functionary could proceed, or how the case would be at all advanced.

Next, as regards the date from which damages are to run, we find that the plaintiff has distinctly pleaded that notice to deliver the lands was served on the defendants, and further that he has established this allegation by evidence which shows that the said notice was served at the end of Choitro 1262.

For a basis of calculation we may therefore take the 1st of Bysack 1263 as the date for the commencement of damages, and we find also that the area of lands and the rate of rents due on each pakhee, or 1½ beegahs, have been already judicially established.

Deducting then from the original claim of 105 khadas, some lands admittedly possessed by the defendants, and some other lands usurped by Ramrutton Roy, which are the subject of a separate suit, there remain 62*khs.* 8*ps.* 5-15 on which damages are due at the rate of 1-14 siccas or 2 Co.'s rupees per pakhee; and this would amount to about a sum of rupees 2,000 a year for which the plaintiff is content to take a verdict. This sum accordingly we hereby fix as the precise yearly sum due to the plaintiff, with simple interest at 6 per cent. on the above sum at the close of each year.

In the event of non-compliance by the defendants, on the ground of their inability to discover the lands, we decree to the plaintiff the sum of 15,936 rupees, which is that fixed by him in his plaint as the value of the same. The payment of this sum will be the penalty of failure to point out the lands, and we observe that it must be much below the market value of property so considerable in extent. Our decree, then, by which we trust that this long-pending litigation may be terminated, must be per-

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emptory on the defendants as ordering them to point out the lands. They will also pay the plaintiff the yearly sum of rupees 2,000, with simple interest at 6 per cent. from the date specified up to the date of the discovery of the lands, or to that of the payment of the penalty adjudged, on failure to discover the lands. They will further be liable for a penalty of 15,936 rupees should they fail to discover the lands; and they will be cast in all the costs of suit. This disposes of Case No. 360.

In Case No. 361 we find that the Judge has dismissed the suit, mainly on the ground that the plaintiff has given no proofs of his possession at any time within 12 years. But we observe, first, that the plaintiff's plea that he was in possession through Gooroo Doss the defendant in the separate suit, has been much too hastily over-ruled. It is quite clear to us that, looking either to the special Law of Limitation which rules suits to reverse proceedings of the survey authorities, or to the general Law of Limitation, the plaintiff is ostensibly in time. It is, however, incumbent on him to show that he was in possession within 12 years before his suit; and this he contends he would have been able to do, had a proper issue been framed in the case. But the only issue that we can discover as framed by the Lower Court is to what village did the lands belong, and who had any right to them.

This is not the way the case should have been put in issue; and as we are satisfied that justice has not been done, and that the plaintiff has not had a fair opportunity of proving his claim, we have determined on remanding this case to the Lower Court. The points to be tried will be, up to what period was the plaintiff in possession through the defendant Gooroo Doss, if these lands are held to form part of the original 105 khadas; and when and how did Ram Rutton take possession of the lands. This will also involve the validity of the plea raised by Ram Rutton, *viz.* that the lands belong to his separate talook, and were not usurped from the 105 khadas; and will involve the consideration of the precise time of such usurpation, if any took place, Gooroo Doss's possession having been ostensibly relinquished in 1851 by his throwing up the lease And it would be for the defendant Ram Rutton to rebut any presumption arising from the fact of possession up to that date by Gooroo Doss.

The Judge should look at the chittas relied on by the plaintiff, which, though dated as far back as 1233-4, the plaintiff contends, will enable him to identify the lands through the help of papers, to be furnished by Gooroo Doss. These papers Gooroo Doss must be called on to produce, by a responsible agent or servant; and they will then be considered and weighed and compared with the aforesaid chittas and with any other evidence which either of the parties may adduce. And this separate case will then be decided on the merits, costs following the final result.

The 22nd February 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Limitation (Act XIV of 1859)—Mesne Profits.

Case No. 316 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 30th December 1862.

Mr. John Grey and others (Defendants) *Appellants,*

versus

Anundo Mohun Moitro (Plaintiff) *Respondent.*

Baboos Onookool Chunder Mookerjee and *Juggodznund Mookerjee* for Appellants.

Baboos Kishen Kishore Ghose, Unnoda Pershad Banerjee, and *Girja Sunker Mojoomdar* for Respondent.

Under Act XIV of 1859 a suit for mesne profits may be brought within 12 years from the date on which a decree for possession was passed.

Loch, J.—PLAINTIFF was the purchaser of a putnee tenure at auction, and was kept out of possession by the defendant zemindar. He brought an action for possession; and after running the usual course of litigation, it was decreed in plaintiff's favor by the late Sudder Court on 3rd April 1861. Plaintiff now sues to recover mesne profits during the period of his dispossession from 1256 to the time of his re-entering in possession under the judgment of the Sudder Court.

The Principal Sudder Ameen, after setting aside the plea of limitation, and making

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a local investigation regarding the amount of mesne profits, gave a decree for plaintiff, exclusive of interest, which was allowed from the date of suit.

The defendants have appealed from this decision, urging the plea of limitation, and contending that the mode in which the mesne profits were ascertained was altogether irregular, and that the Principal Sudder Ameen has given a decree for the amount of assets of the tenure, and not of collections made by defendant, for which alone she can be held liable.

A preliminary objection to hearing the appeal was taken by the pleader for the respondent that the appellants, Messrs. Grey and Robinson, took the putnee under a lease subsequent to the period to which the suit relates; that they were not concerned in the present suit, and consequently have no right to bring an appeal, whatever may have been their arrangements with Chundromonee. As, however, Chundromonee has filed a separate vakalutnamah, and joined in the appeal, the Court see no objection to its being proceeded with.

On the point of limitation it is urged that the provisions of the new law, Act XIV of 1859, are much more stringent as to the admission of suits than the old law; Section 14 Regulation III of 1793; that the new law not only reduces the period for bringing the action, but looks strictly to the time when the cause of action arose, and allows of no extension of time except as provided in Sections 9 to 14; that consequently the plaintiff cannot shelter himself under the rulings of the late Sudder Court, which allowed a suit for mesne profits to be brought within twelve years from the date on which a decree for possession was given, but must bring a suit within six years from the date on which he was deprived of the mesne profits sought to be recovered, and consequently all the mesne profits claimed for the period, previous to the six years immediately preceding the date on which the suit was brought, must be refused; that while Section 10 Act VIII of 1859 allowed separate suits to be brought for possession and mesne profits, Clause 16 Section 1 Act XIV of 1859 restricted the period for bringing a suit for mesne profits to six years from the deprivation of such profits.

We think that the new Law of Limitation, Act XIV of 1859, while limiting the period within which certain suits may be brought, does not restrict the time for instituting a suit for the possession of immoveable property, or any interest in immoveable property. That period is under the new law, as under the old, twelve years. A suit for possession and mesne profits can, we think, be brought at any time within twelve years from the date of dispossession, and if this be the case, we do not understand how that time is restricted, where a suit for mesne profits is separately brought. Admitting, however, for the sake of argument that the time for bringing a suit for mesne profits is limited to six years, yet this restriction of time does not affect the principle laid down in the decisions of the late Sudder Court ruling that the right of action commenced from the date when the decree for possession was passed. The ruling cases are noted in the margin. In the former case the Court held that the cause of action must be considered to have arisen when all litigation regarding the right to the lands finally ceased. In the latter the Court were unanimously of opinion that, as the suit for mesne profits had been brought within twelve years from date of the final decision in appeal of the suit of plaintiff for possession of the lands for mesne profits of which he now sued, the suit would lie, and was not barred by limitation. The principle laid down in these decisions is applicable to the present case. Plaintiff obtained a decree for possession on 3rd April 1861, and he brought his action for mesne profits during the period he was kept out of possession, *viz.* May 1862. He was therefore clearly within time, and can sue for the mesne profits of the whole period of his dispossession.

8th September 1853, page 830-31.
Azrawil Singh, Plaintiff Appellant
versus
Balgobind Singh, Defendant Respondent.

16th January 1854, page 32.
Bachoo Chowdree, Plaintiff Appellant
versus
Ram Narayen Singh and others, Defendants Respondents.

As regards the 2nd objection, we find from the judgment of the Lower Court that the Ameen was unable to ascertain from the dakhilas procured from ryots what was the rent paid by them for such portion of the disputed lands held by them, because these receipts were given for the rents of these and other lands in their occupation. Besides, from the record it appears that the lands are chur; and as such not cultivated to any great extent by ryots, but suitable for indigo. Not being able to get any reliable information on the property itself, the Ameen endeavored to ascertain the rates at which lands of a similar character were assessed

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in the immediate neighbourhood; and calculating at these rates, he found the wasilat for the period under claim amounted to Rs. 24,014-7-12; and the Principal Sudder Ameen, considering the objections urged by the defendants at the time of the local investigation before the Ameen to be unsupported by proof and unworthy of credit, gave a decree for Rs. 17,500, the amount claimed by the plaintiff. The Ameen's report was filed on 27th December 1862, and the suit was decided on 30th idem. Appellants therefore urge with justice that no time was given them to bring forward their objections to the mode of investigation adopted by the Ameen, and the conclusion to which he has come. Now we think that the Principal Sudder Ameen has disposed of this part of the case somewhat too summarily, and without endeavoring to procure all the evidence which might have been brought forward for the right determination of the question. While the sum claimed by the plaintiff does not, in the opinion of the Court, appear extravagant, considering the period during which he was out of possession, and the extent of the property in litigation, yet it is not sufficient to assess the amount of mesne profits on a calculation based on the rates assessed in the neighbouring estates, without giving the defendants an opportunity of showing what were the real assets and collections from the property. For this purpose the defendant appellant should have been required to produce her account; and though the detail of ryots located on the property may be very small, and the rents realized from them insignificant, yet still she may have derived considerable profit from letting the lands to planters for sowing indigo, and such sums received from them should be taken into account, and for this purpose her accounts and her servants enjoyed in keeping such accounts, and those employed in making collections should be examined. It is for defendant, if she object to the Ameen's investigation, to shew fairly and to the satisfaction of the Court what were the real assets and collections from the property, and we think it necessary to remand the case to the Lower Court, in order that the Principal Sudder Ameen may conduct the investigation in the manner above indicated, and return the papers with his opinion on the evidence for the final decision of this Court, when the respondent's claim to obtain interest will be taken into consideration.

The 22nd February 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Plaint (Registration of) – Joinder.

Case No. 280 of 1863.

Regular Appeal from a decision passed by the Judge of Beerbhoom, dated the 29th February 1863.

Jugobundhoo Dutt and another (Plaintiffs) *Appellants,*

versus

Mr. C. B. Maseyk and others (Defendants) *Respondents.*

Baboos Dwarkanath Mitter and *Unnoda Persad Banerjee* for Appellants.

Baboo Banee Madhub Banerjee for Respondents.

Where, from press of business or any other cause, a plaint cannot be registered on the day it is actually presented, it should still be entered under that date. If the presiding Judge be unable to take up and examine the plaint at the time of presentation, he should have a note of the date of presentation at once endorsed and signed by him.

In a suit by two plaintiffs for the value of personal property plundered, of which one plaintiff claims to be the proprietor of certain articles, and the other plaintiff of others, if the cause, the time, the place, and the parties charged be the same in both instances, the fact that both plaintiffs have not a joint interest in the whole of the property plundered by the defendants is insufficient to put them out of Court.

Loch, J. THIS was a suit to recover the value of personal property plundered from the residence of the plaintiffs by the defendants on the 23rd Magh 1266, for which offence some of the defendants were tried and convicted by the Nizamut Adawlut, and sentenced to various periods of imprisonment.

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The Judge has dismissed the suit, holding that it has not been filed within time. The offence was committed on 23rd Magh 1266, 4th February 1860. The Judge considers this case to fall under the provisions of Clause 2 Section 1 Act XIV of 1859 as extended by Act XI of 1861, and finding that the plaint, though dated the 30th December 1861, and bearing an endorsement signed by the Principal Sudder Ameen of the same date to the effect that it was presented on that day, was not actually put in till after the 31st December 1861, which was the latest date on which the suit could be instituted, dismissed the case.

An appeal is preferred on the part of the plaintiffs on two grounds: 1*st*, that the Judge's finding that the plaint was filed on 2nd January 1862 is erroneous; 2*nd*, assuming the fact to be as found by the Judge, he was wrong in applying the one year instead of the six year rule prescribed by Clause 16 Section 1 Act XIV of 1859.

In support of his *second* plea, the pleader read a decision of a Full Bench dated the 26th August 1863* in the case noted in the margin, in which the Court held that a suit for damages done to property must be brought within one year from the cause of action, as prescribed by Clause 2 Section 1 Act XIV of 1859, but that suits for the value of property carried away could be brought within six years under the provisions of Clause 16 of the same Section. The Counsel for the respondent stated that, after perusing this judgment of the Court, he did not intend to contest this point further, but was prepared to go into his cross-appeal.

Saduck Mundul *vs.* Robert Watson & Co.

The pleader for the appellant requested permission to clear his client from the charge made against him in the Judge's decision. The Court however thought it unnecessary for him to proceed further with the case, as they were satisfied that the plaint had been presented in due time, and that it had been registered in January instead of on the day it was presented. This might have been occasioned by press of business, but the Court are aware of a practice not uncommon in the Courts presided over by the Native Judges, of keeping back cases instituted at the close of a month or year till the commencement of the next month or year, in order to make a good statement. If, from press of business or any other cause, plaints cannot be registered on the day they are actually presented, they should still be entered under that date, and not under a subsequent date, for the difference of a day may be, as shown in the particular instance before us, of material consequence to a suitor. If the presiding Judge be unable to take up and examine plaints at the time of presentation, he should at any rate, for the security of the suitors' interests, take care that a note of the date of presentation be at once endorsed and signed by him. We think therefore the Judge's decision on the point of limitation must be set aside.

On the part of the respondents, it is urged that there is a complete misjoinder of parties in the present action, and therefore the suit must be dismissed. The plaintiffs live in the same house, but they have not a common interest in all the property for the value of which the present action is brought. One plaintiff claims to be the proprietor of certain articles of property, and another claims others. If such a misjoinder, as has taken place in this case, were allowed, any number of tradesmen might join together and bring one action against a debtor for their separate claims.

We see no sufficient reason why the action should not proceed in its present form, nor do we think that the illustration adduced at all meets the case. There can be no difficulty in deciding upon the claims of the respective plaintiffs. The cause of action is common to both, *viz.* the attack on their residence; the time when the injury complained of was committed is one and the same, and the parties who committed the injury are also the same in both cases. No Court is ousted of its jurisdiction by the form of this action, and the irregularity, if any there be, does not injure the defendants, but is in their favor, inasmuch as they have to defend one instead of two actions; and justice can be done in the form in which the suit has been brought. The cause, the time, the place, and the parties charged, being the same in both instances, the fact that plaintiffs have not a joint interest in the whole of the property plundered by the defendants is in our opinion insufficient to put them out of Court. Under this view of the case, we decree the plaintiff's appeal with all costs, and dismiss the defendant's appeal with any costs that may have been incurred. The case will be returned to the Lower Court for decision on its merits.

* *See* Sutherland's Full Bench Rulings, p. 126.

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The 23rd February 1864.

Present:

The Hon'ble Shumboonath Pundit and G. Campbell, *Judges.*

Joint Hindoo Family—Permanent lease by elder brother—Possession.

Case No. 1716 of 1863.

Special Appeal from a decision passed by Baboo Huro Chunder Chatterjee, Principal Sudder Ameen of West Burdwan, dated the 11th March 1863, *reversing a decision passed by the Sudder Ameen of that District, dated the 19th April* 1862.

Brojo Mohun Ghose (Defendant) *Appellant,*

versus

Luchmun Singh Thakoor and others (Plaintiffs) *Respondents.*

Baboo Luckhee Churn Bose for Appellant.

Baboo Bhoobun Mohun Roy for Respondents.

The elder brother in a joint Hindoo family cannot grant a permanent lease of land where it is not pleaded or proved that any consideration was paid or applied towards meeting any necessary expenses of the joint family

Long possession under such an invalid pottah cannot avail as against the minor brothers.

Shumboonath Pundit, J.—THE ryot alone appeals. A mourosee pottah was given to the ryot by the brother of the plaintiffs while they were minors, and it is not at all pleaded or proved that any consideration was paid or applied towards meeting any necessary expenses of the joint family. It is clear that the elder brother in such a case had no legal authority to grant a permanent lease of the lands in dispute such as to make it binding upon the plaintiffs.

The ryot farther pleads that, though the pottah is pronounced invalid, he having held possession for a long time, plaintiffs are not entitled to dispossess him altogether. This plea cannot help the special appellant, because, having held only under this pottah now found to be invalid as against the plaintiffs, he cannot have any right to hold possession against them.

We accordingly reject the special appeal with costs.

The 24th February 1864.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble F. B. Kemp, *Judge.*

Compromise (by mother as guardian)—Age of majority (for proprietors of revenue-paying estates.)

Case No. 2 of 1863.

Regular Appeal from a decision passed by Mr. G. Loch, Judge of Purneah, dated the 19th November 1862.

Ranee Roushun Jahan (Plaintiff) *Appellant,*

versus

Syed Enaet Hossein and others (Defendants) *Respondents.*

Messrs. R. V. Doyne, G. C. Paul, H. Stainforth, and *C. Gregory,* and *Baboos Unnoda Persad Banerjee* and *Dwarkanath Mitter* for Appellant.

Messrs. A. T. T. Peterson, R. T. Allan, W. Tayler, Moonshee Ameer Ally, and *Baboo Kishen Kishore Ghose* for Respondents.

A mother as guardian has no power to make a compromise on behalf of a minor daughter, unless the compromise is beneficial to the daughter's interests.

Semble.—Regulation XXVI. 1793 (fixing 18 years as the legal age for the exercise of the powers of a proprietor of an estate paying revenue to Government) applies not only to proprietor out of possession, but also to a co-sharer, as well as to the proprietor of an entire estate.

Peacock, C. J.—WE are of opinion that the judgment of the Court below cannot stand. The only issue which the Judge raised was "whether the deed of compromise dated 31st August 1856, and the papers anthorizing its presentation to the Sudder Court in appeal, are genuine documents, executed and given effect to, with the knowledge and consent of the plaintiff, or fraudulent and false documents given effect to *malâ fide* by the defendants." Some evidence was given on the part of the plaintiff, after which, according to the Judge's statement in his decision, "Mr. Gouldsbury wished to send a Commissioner to examine the plaintiff at Kissengunge ; but as it was only to substantiate the allegations in her plaint, the verification to which had been ruled as sufficient in the High Court, and to which the Counsel for defendant had now no objection to offer, the examination would have caused delay, and would have effected no good." The examination therefore "was not ordered." We do not know precisely what the Judge means by the

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above statement that the Counsel for the defendant had now no objection to make to the verification. We understand him to mean that, as the verification is not objected to, the allegations of the plaintiff in her plaint are tantamount to evidence in her favor. If the Counsel for defendant admitted them to be so, they must be taken as proof given by the plaintiff of the facts stated in the plaint, which, taken with the other evidence, was sufficient *primâ facie* evidence of fraud. If the Counsel did not intend to admit that the plaint was to be received as evidence, the Judge ought to have allowed the plaintiff to give evidence herself, in addition to the evidence of the witnesses whom she had called. She might have come forward and sworn that she never executed the documents which she called fraudulent and false, and that she never knew of the real state of the case until she attained her majority. On the other hand, having held that there was not sufficient evidence in support of the plaintiff's case, he stopped the defendant from going into evidence, and it would be unjust for us to decide the case without allowing the defendant to call such witnesses as he may think fit. We have no sufficient evidence before us to say that a case has been made out on the part of the plaintiff, or whether, if a *primâ facie* case has been made out for plaintiff, the defendant is able to rebut it.

There is another ground upon which the case must be remanded. The issue laid down by the Judge only affected that portion of the plaintiff's father's share of the grandfather Deedar Hossein's property, which was the subject of the former suit. But the plaintiff also claimed a further portion of Rajah Deedar Hossein's property, which, according to her statement, passed to her uncle Edoo and to her grand-mother, and also 7 gundahs 1 courie 4½ krants of the 1 anna 8 gundahs share of the property of the late Ranee Shoomrun recovered by defendant Enaet Hossein by the decree of the Privy Council. As to these portions of the property no issue was raised, and the decision of the late Sudder Court did not apply to them, inasmuch as they formed no part of the property claimed in the former suit.

The case must also go back for another purpose, namely, to ascertain whether she was under age at the time when the alleged compromise was effected, because, if she was under age, it will then be necessary, whether the compromise was fraudulent or not, to ascertain whether it was binding upon the plaintiff as being a beneficial compromise, which her mother, as guardian, was authorized to make on her behalf. Supposing, then, it should be found that the plaintiff was under age, and that there was no fraud or misrepresentation on the part of the mother, the question will arise whether the mother, as guardian of the plaintiff, did compromise the plaintiff's suit, as well as her own, and whether such compromise bound the plaintiff. The mother, in her answer, says that she only compromised her own suit, and she might have been examined as a witness. If she compromised the plaintiff's suit, whilst the plaintiff was under age, it must be tried whether the compromise was beneficial to the daughter's interests, for otherwise the mother, as guardian, had no power to make a compromise on behalf of her daughter. The Judge has not entered into those questions at all, neither did he raise any issues as to them. When he comes to try those questions, there are many important facts which will require to be considered by him. The petition of compromise, in the daughter's suit, was presented by the mother as guardian, as well as by the daughter, who was represented to have attained her majority. If the daughter had attained her majority, the mother had no power to compromise the suit. The daughter says that an idea had come to her that she would lose the suit and have heavy costs to pay. In considering the question of fraud, it will be material to ascertain, if she executed the petition, who led her to the idea, and by what means.

It appears that the 31,400 rupees, alleged to have been paid by the defendant, were not paid to the guardian, but that part was remitted, part allowed for the purchase-money of a putnee talook granted to the mother alone, and not to the guardian for the infant, and that part was secured by a tumasook. There are important matters to be taken into consideration in deciding whether the compromise was beneficial to the plaintiff. It seems that the mother got the full benefit of the money, and there is no evidence to show that the plaintiff has ever received any portion of the money or any part of the profits of the putnee talook.

Then, again, we have not the tumasook before us, and we do not know whether it will be proved or not, and, if proved, whether the plaintiff appears to have any interest in it; therefore it will be a question for the Judge to consider whether the tumasook, if given, appears upon the face of it to have

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been given for the benefit of the plaintiff or of her mother alone, whether the tumasook has ever been paid, and whether the plaintiff has ever received any portion of the money secured by it.

Then, as to part of the money having been remitted, we do not know how much of the 41,000 rupees, mentioned in the receipt, was remitted, and for what purpose. As the putnee talook was granted only the day before the petition, no rent could have been due, and, therefore, none could have been remitted on account of the rent of the putnee.

Again it is alleged by the defendant, in the 3rd para. of his written statement, that "afterwards the plaintiff herself, in conjunction with her mother, continued to "receive the allowance fixed by Deedar "Hossein, tendering receipts of 21st Cheyt "1264, 24th Assin 1265, 23rd Assin, and "26th Falgoon 1266, and deducting the "amounts from the rent of the putnee "mehal of one-half of Talooks Dhuntallah, "&c." Whether these receipts were really signed and given by the plaintiff, or merely alleged by the defendant to have been given by her, and if she really executed, whether she was of age at the time or not, are all matters to be considered by the Judge. Besides, the defendant says that the receipts were given, but he does not say whether the amounts were paid, or whether the plaintiff derived any benefit for the allowance of these sums in discharge of the rent of the putnee, which apparently belonged solely to the mother. All these matters must be enquired into.

It is contended, on behalf of the plaintiff, that, according to Regulation XXVI of 1793, the plaintiff had not attained the age of majority, because the plaintiff being stated to be a proprietor of an estate paying revenue to Government, by virtue of that Regulation she was not of age until she attained her eighteenth year. It is alleged, in paragraph 4 of the defendant's written statement, which he verified on oath, that "the plaintiff's allegation in the plaint that she attained her "majority on the 9th July 1859 is utterly "false, because *the fact of her birth on the* "*6th Maugh* 1247 *will be proved by her* "*horoscope, &c.*" Now, if the defendant's statement be true that the lady was born on the 6th Maugh 1247, it shows that she was not eighteen until a year after the compromise, and Regulation XXVI of 1793 required her to attain the age of eighteen before she could exercise the powers of a proprietor of an estate paying revenue to Government. One case has been cited, which was decided by Mr. Justice Elphinstone Jackson and Mr. Justice Roberts, to shew that this Regulation did not apply to a proprietor of an estate out of possession. But that decision appears to us to be inconsistent with the former cases decided by the Sudder Court, and not to be a correct construction of the Regulation itself.

The Regulation recites :—"By the original rules for the Decennial Settlement of "the three provinces, minors were declared "disqualified for the management of their "estates ; and according to the rules for the "establishment and guidance of the Court of "Wards passed on the 15th of July 1791, "and re-enacted with modifications by Regulation X of 1793, the minority of proprietors of lands is limited to the expiration of the fifteenth year. In fixing this "period, Government were guided solely "by legal considerations, the Mahomedan "and Hindoo Laws, although they prescribe "no specific age for the termination of minority, indirectly pointing out the fifteenth "year as the time when persons are to be "considered competent to the management "of their affairs. Instances, however, have "recently occurred that evince the inexpediency of vesting proprietors with the "charge of their lands at this early period ; "and general principles which have their "foundation in human nature justify the "conclusion that the same effects would "result in similar cases that might hereafter occur were the cause allowed to exist. At this early age the proprietors "must necessarily be unacquainted with the "laws and regulations which they are bound "to observe in the management of their estates, and their understanding cannot be "sufficiently matured to render them sensible that their welfare depends upon their "making the acquirement of this knowledge, the chief object of their pursuit. "Emancipated from the control of their "guardians, and with their property at their "disposal, they abandon themselves to those "pleasures to which their youth naturally "inclines them ; the management of their "estates consequently devolves to favorites "or dependants, who are interested in confirming them in habits of dissipation, until "they have lost both the capacity and inclination to assume the direction of their "own affairs. But the pernicious consequences, resulting from the incapacity of

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"the proprietors, are not confined to themselves. The cultivators of the soil, and "the various orders of people residing upon "their lands, suffer equally by the rapacity "and mismanagement of their agents, the "payment of public revenue is withheld, "and the improvement of the country retarded. It is, therefore, incumbent on the "Government, as well as with the view to "the future welfare of the proprietors of "land in general, as to protect the country "from the frequent shocks to which it "would necessarily be liable from their "want of education and early corruption of "morals, to extend the term of their minority to an age by which, with due attention on the part of their guardians, they "may be rendered qualified for the management of their estates."

Section 2 goes on to provide :—"The rule "contained in Section 28 Regulation X of "1793, which limits the minority of Hindoo "and Mahomedan proprietors of estates "paying revenue to Government to the "expiration of the fifteenth year, is hereby "rescinded, and the minority of such proprietors is declared to extend to the end "of the eighteenth year."

There was a subsequent decision in which Mr. Justice Louis Jackson and Mr. Justice Campbell held that eighteen was the age of majority. Then there is a decision reported at page 108 of the Sudder Court's Decisions for 1857, in which it was held by a majority of a Full Bench of five Judges that the plaintiff in a suit for arrears of rent was entitled to deduction of the time during which he was under 18, notwithstanding his estate was then under a guardian, or the Court of Wards. In another case, which was cited by Mr. Doyne, reported at page 1339 of the Decisions for the same year, it was held by a Bench of three Judges that the plaintiff, being a co-proprietor of an estate, when his uncle, whose share of the property was in dispute, died, was entitled to calculate his majority from the time of being 18 years old according to Section 2 Regulation XXVI of 1793. This shows that the Regulation extends not only to proprietors out of possession (for the plaintiff in that case was suing to recover his estate) and that it applies to a co-sharer, as well as to the proprietor of an entire estate. Another case was cited by Mr. Doyne, reported at page 1349 of the Decisions for 1858, by which the order of the Lower Court, in a summary case, dismissing the petitioner's suit instituted by her during her minority, was affirmed; minority in her case being held to extend to 18 years of age, as she sued as proprietor of an estate paying revenue to Government.

We think that these decisions put a right construction upon the Regulation, and that, even according to the defendant's written statement, the plaintiff had not attained majority when the compromise is alleged to have been effected. We do not, however, intend to decide this point finally. As the case may eventually go up in appeal to the Privy Council, we think that the whole question should be fully tried, in order that it may be ascertained whether, according to Mahomedan Law, independently of the Regulation above referred to, the plaintiff was of full age at the time of the execution of the compromise. The Judge will probably be guided by our view of the construction of the Regulation. If the case should again come up to this Court in appeal from the Judge below, and the question arise as to the proper construction to be put on Regulation XXVI of 1793, we shall probably refer that point for a decision by a Full Bench, but we wish the facts to be first proved, and do not decide the point of law now.

We, therefore, think that the case must be remanded to try the following issues, in addition to the one laid down by the Zillah Judge :—

1*st*.—Was the plaintiff of age, according to the Mahomedan Law, independently of Regulation XXVI of 1793 at the time when the alleged compromise was effected?

2*nd*.—Did the plaintiff execute the documents which purport to have been executed by her, or any and which of them?

3*rd*.—If so, was she induced to execute the same by means of fraud or misrepresentation?

4*th*.—Was the compromise a fair one and beneficial to the plaintiff?

5*th*.—Did the plaintiff receive any portion of the money alleged to have been paid by the defendant, or any portion of the profits of the putnee talook?

6*th*.—Did the plaintiff's mother, Khobunissa, receive the money mentioned in the receipt, or any and what portion of it, or any tumasook for any and what part of it; and, if so, was the tumasook for the payment to Khobunissa alone, or to her and the plaintiff jointly?

7*th*.—Were all, or any, and which of the receipts alleged by the defendant in his

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written statement, to have been executed by the plaintiff, executed by her; and, if so, were they obtained by fraud or misrepresentation, and had the plaintiff at the date of any and which of those receipts attained her majority according to Mahomedan Law, irrespective of the Regulation XXVI of 1793?

8th.—Was the decree in the Zillah Court of Purneah of the 30th August 1856, establishing the receipt for the 31,400 rupees, obtained by fraud or misrepresentation?

9th.—Was the decree of the Sudder Court of the 10th December 1856, founded on the alleged compromise, obtained by fraud or misrepresentation?

10th.—If not, was it binding on the plaintiff as carrying out an arrangement beneficial to her, which her mother, as her guardian, was competent to enter into?

These are the issues which we consider necessary for a proper determination of the plaintiff's right to set aside the decree of the Sudder Court. It appears to us that this appeal is in the nature of a bill for a review of judgment, and, therefore, when that decree is set aside by virtue of a regular suit, the same rights will arise as if the Court, upon review of judgment, had set aside its own decree. The above issues will apply, of course, to the plaintiff's claim, only so far as affects that portion of Deedar Hossein's property which was the subject of the former suit. But they do not apply to the shares which belonged to her uncle and her grand-mother, or to the share of the property recovered by defendant by the decree of the Privy Council. These are wholly distinct matters from that at issue before Mr. Loch, and therefore as to them, we think it proper to lay down the following issues to be tried by the Judge:—

1st.—Did the father of the plaintiff survive her uncle Edoo Hossein, and is the plaintiff entitled to recover any and what portion of the share, if any, of her uncle Edoo Hossein of the estate of the plaintiff's late grand-father Rajah Deedar Hossein?

2nd.—Did Edoo Hossein receive the allowance given by his father's will, or assent to the will?

3rd.—Did the plaintiff's grand-mother Mussamut Beebee Lodheen *alias* Synea succeed to any and what portion of the estate of Rajah Deedar Hossein?

4th.—Did Beebee Lodheen take the allowance as alleged in the defendant's written statement?

5th.—Is the plaintiff entitled to recover any and what portion of Beebee Lodheen's share, if any, of Rajah Deedar Hossein's estate?

6th.—Is the plaintiff entitled to recover any and what portion of the 1 anna 8 gundahs share of the zemindaree of Soorjapore, recovered by the defendant under the decree of the Privy Council dated the 11th July 1859?

It appears to us that it would be very inconvenient and probably perplexing to the Judge to try all the issues. In order that the Judge's mind may not be distracted by mixing up two different cases, we think that he should first try the issues as to that portion of the father's share which was the subject of the former suit, and having done so to try the issues which relate to the property not included in the former suit. Probably, the witnesses may not be the same in both cases. But, even if they should be the same, very little delay will be caused, for the second set of issues may be put down for trial, and may be tried as soon as the first trial has been completed.

The case must be restored to its original number on the Judge's file, and tried as speedily as possible, after allowing both parties reasonable time to procure their witnesses. As there are new issues raised, and the Judge stopped the defendant from going into evidence, we think that either party should be at liberty to call such further evidence as he or she may think necessary, and we, therefore, order such additional evidence to be taken. The Judge having refused to send a commission for the examination of the plaintiff, we order that he allow the plaintiff and also her mother to be examined by either party under commission, upon being satisfied that they are entitled to the privilege of being examined in that manner. The Judge is also directed to examine the Rajah Enayet Hossein and Asgar Ally, whose evidence, in our opinion, is very important in this case. The Rajah should also be required to produce the original receipt dated the 5th Sraban 1251, alleged in the defendant's written statement to have been granted by the plaintiff's father in conjunction with Bahadoor Hossein, Muneroodeen Hossein, and others, sons and daughters of Rajah Deedar Hossein; and if the same has been filed in any other suit, the Judge is directed to send for the original, and require the execution of it to be proved. Many copies of original documents appear to have been filed by the defendant Rajah Enayet Hossein,

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but the Judge should not admit the copies, unless it be proved that the originals are lost or destroyed; and, if the originals be produced, the Judge should require strict proof of their execution.

The nuthee in this case will be sent back to the Judge. Any other papers which may be required in this case can be applied for by the parties, or sent for by the Judge. It is further ordered that a printed copy of the papers translated for this Court be sent to the Judge, with the nuthee for his convenience only, but the printed copy is not to be considered as binding upon him as to the correctness of the translations or otherwise.

The 24th February 1864.

Present:

The Hon'ble W. Morgan and Shumbhoonauth Pundit, *Judges.*

Limitation—Inheritance—Hindoo Widow.

Case No. 1380 of 1863.

Special Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 21st January 1863, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 17th January 1862.

Mussamut Parbutty Moflessa (Plaintiff) *Appellant,*

versus

Mussamut Rajoo and others (Defendants) *Respondents.*

Baboos Kally Mohun Doss, Debender Narain Bose, Mirtonjoy Mookerjee, Oprokash Chunder Mookerjee, and *Kally Kissen Sen* for Appellant.

No one for Respondents.

Adverse possession which bars a Hindoo widow representing the estate of her deceased husband also bars the heir after her.

Morgan, J.—The defendants have held possession of the land ever since the year 1842, when the father of the plaintiff (special appellant) died. Whether the alleged hibanamah from the plaintiff's father to the defendants is a forgery or not, the defendants have had an adverse possession for upwards of twenty years from the father's death. It is clear that the widow, by her neglect, has lost all right of suit; and there are authorities to show that the widow fully represents the estate left by her husband, and that adverse possession which bars her, bars the heir also after her. But if it be considered, in the present case, that the daughter also might have sued after her father's death, can she now sue? She was a minor at the time, but she attained her full age more than three years before the commencement of this suit, which is, therefore, barred by Section 11 of Act XIV of 1859. The Court finds that there has been no collusion between the widow and the defendants. The plaintiff's suit is for the recovery of the property, and to obtain the registration of the plaintiff's name as proprietor. The Lower Appellate Court is of opinion that the plaintiff, though she cannot maintain her present suit, may sue after the death of her mother. Whether this dictum is right or not, or whether (as was contended) the plaintiff may now maintain a suit of a different description or not, it is needless to determine. I confine myself to the suit before me, which is I hold barred by limitation.

Dismiss the special appeal.

Shumboonath Pundit, J.—According to my view of the rights of a Hindoo widow in possession of the estate of her deceased husband, in certain matters, she represents the estate completely, such as management, recovery, protection of moveable and immoveable, collection of rents, debts, &c. In these matters, according to the Hindoo Law, as practically understood in this country, though by the acts of the widow of omission and commission, there may be loss to the estate, actual diminution from the quantity of lands, of stock, and decrease of profits, as long as her proceedings are *bonâ fide*, no other heir of the husband, whose rights are contingent during her life, has any right to interfere. She is not to be molested in her management, and her possession is not to be interfered with, on the ground that the estate can be, in any one of these matters, better looked after by a different line of conduct. She is at perfect liberty to act according to her own discretion. No next heir of her husband can revive, after or before her death, a boundary question settled in the presence of or by the widow, or a demand allowed by her to become affected by limitation. The next heir may, however, on the ground of collusion, have a right in some cases, such as a boundary settlement, &c., to obtain from the Courts of Justice a declaration during the life of the widow that her collusive act will not operate to the injury of his interests when entitled to take possession as pro-

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prietor. The next heir of her husband, who is authorized to bring an action for such a redress on the ground of prevention of waste, must, however, be required to do so within the time allowed, calculating his cause of action from the time that the alleged collusive act was performed. In matters in which the widow deals with the property in a manner that her acts last for her life, and then their existence and operation is likely to go beyond her life, such as a gift, sale, or a permanent lease of landed property, the next heir has a right to ask a Court of Justice to decide whether her act was or was not beyond her limited powers, or that she had exercised her powers with or without any necessity recognized by the Hindoo Law as authority for such acts of alienation.

If such a suit is brought during the life of the widow, and it has now been ruled that it can be brought at any time during her life, it must be simply for a declaration of right, and cannot be for proprietory possession. On the ground of such acts of waste, the next heir also has a right to ask Courts of Equity to dispossess the widow, and to order the estate to be held by a receiver for her benefit, and he himself may get the receivership with or without security, as the best person entitled to be selected for the office.

As persons deriving their title from widows cannot but know that they are dealing with a proprietor whose rights are comparatively limited, it is not in anywise unfair that it has been ruled that, for setting aside the illegal acts of alienation by the widow, the next heir might not, if he like, sue at all during the widow's life ; but calculating his cause of action from the time when his right to hold possession arises to him on her death can bring an action in due time from her death. In matters, however, where third parties set up a title against the estate of the husband of the widow, adverse to the widow as well as to other next heirs of her husband, it is clear that either these heirs have no right to bring any action, or that their rights in these matters are exactly as in matters for which the widow completely represents the estate ; but still these next heirs of her husband have a right to interfere. Here the title is not acknowledged to be derived from the widow, but is adverse to the widow herself. Many cases coming under this class might be matters already noticed under the head of cases in which any other person, besides the widow, do not ordinarily possess a right to interfere; but wherever there is any right to the next heir to sue for redress in any such matter, he must be required to do so within the period allowed to the widow herself, subject, however, to any decrease or increase for existence or non-existence of a disqualification in him as compared with the widow. The next heir may be a minor, when the cause of action arose, and the widow may not be so, and *vice versâ*. The right of a Hindoo son and grandson where Mitakshara prevails, with regard to the ancestral property left by his grandfather and great grand-father, may also be of this class. As these co-heirs are supposed to have a right against the will of their father and grand-father with regard to ancestral property to ask for partition (*see* Madras Decisions of the High Court O. J., page 77, November 1862) it may, perhaps, be proper to rule that a title created by the father or grand-father of the co-heir, after the birth of the latter in favor of a stranger, must be equally adverse to him ; and so he must sue, though only for declaration, within the period of limitation, from the time of the creation of the title. The decisions of Courts in Bengal have, however, considered these inchoate rights of these co-heirs not to be so substantial as described above, but a little better than the rights enjoyed by the next heirs of the husband of a widow, with reference to her illegal alienations, and accordingly the rules of limitation have hitherto been equally the same in both cases. Whether adoption, which, I admit, cannot in any case be supposed to take place *without* the intervention of the widow, should be classed under this, or under the head of titles created by the widow, is a quite different question. The decision of the late Sudder Court, dated 2nd August 1850, reported in page 369, appears to have classed adoptions under the first head and perhaps properly. It may be allowed that, in some cases besides adoption, where a title claimed by a stranger is adverse to the widow, and also to the next heir, the latter may have an independent right of his own to sue to set aside such a title. In the case of a gift under a will from the father, as in this case, set up by a third party, the co-heir may have a right to sue to disprove the will for his own benefit, just as the widow undoubtedly has. I am not prepared to admit that, if the widow is inclined *bonâ fide* to believe that the will was a valid one, that the next heir is not, therefore, empowered to bring an action to prove its invalidity. The *bonâ fide* admis-

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sion by the widow regarding the genuineness of the will to her own prejudice is not a bar to the complaint of the next heir for proving its forgery, but must, after all, operate as a very strong proof of its genuineness. I am not, however, prepared to say that the next heir will be allowed to bring an action against the *bonâ fide* creditor of the estate, on the ground that a certain bond or mortgage claimed by a third party, as executed by the father and allowed by the widow to be good, was not either valid or genuine. In short, it is not easy to make out what are the cases connected with the rights of third parties in which the next heir of the husband of the widow can be allowed to sue. If such suits can, for any matter, be brought at all by the next heir, it is certain they must be brought within the period allowed by law from the time of the thing being done or set up to have been done. On no account, under no good principle of law, the next heir, whenever he has a right to sue, can be permitted to sue for declaration at any time during the life, or virtually for obtaining possession after the death of the widow, taking that period as the commencement of his cause of action. I think that, in the present case, the daughter, as the next heir of her husband, and if there had been a son to the daughter, that son, too, but only if he had been born before the death of his maternal grand-father, might have, notwithstanding the intervention of the mother and the maternal grand-mother, a right to sue to prove that the husband of the widow did not execute the will. (*See* Decisions dated 24th December 1859, page 1623, and 31st of May 1858, page 1103.) I allude alone to the rights of a grandson by daughter, and say that the grandson must have been born when the act complained of was committed or set up, because, just as the widow so the daughter, are both intervening women, enjoying only limited rights, and the daughter's son is the only next male heir, enjoying full proprietory right. It is also clear that, on proving that a certain act pleaded by a stranger to have been done by *his* maternal grand-father was not or could not be legally done by the said ancestor, a grandson *born* after the commission of the act complained cannot legally have a right to interfere, just as, where Mitakshara prevails, a son, not born at the time of the sale of any ancestral property, cannot claim to set aside any such act of alienation. The decisions of this Court which allow that the co-heir can sue within the period of limitation from the death of his ancestor, do not, I think, allow such a son to sue for recovery of property sold without his consent at a time when he was not in existence. A grandson, born after any illegal alienation by his mother or grand-mother, where the title is expressedly derived from these females, may sue during their life, or for a better redress on his own title becoming indefeasible. The exercise of the right which the daughter possesses under the Hindoo Law, with reference to titles from her father pleaded by a third party, cannot be deferred to the death of the intervening widow, without any regard to the operation of the Law of Limitation, and no new cause can in such a case arise to her from the death of the intervening widow. When the decisions of the Civil Courts appear to allow that the daughter may sue for her rights connected with these matters within twelve years of the death of the intervening widow, it will not be considered hard if, according to my view expressed above, she or any male next heir of the widow is required to sue within twelve years of the actual cause of action, and is not allowed to sue afterwards when the title to set aside is pleaded by a stranger adverse to the widow herself. If the plaintiff in the present case has a right of action, she might have sued without any reference to any collusion with her mother. Now, if it is argued that in all such matters she can only sue on the allegation of fraud, and that, too, after the death of her mother, I say if she has a right to sue after the death of the mother, she might also sue at any time on the ground of fraud during her life. But I entertain great doubts regarding her right to sue for possession on the ground of collusion after the death of her mother. The title in this case, pleaded by the defendants in possession, is one alleged to have been derived from her father, and not from her mother. It is, however, clear that plaintiff willingly and falsely, and, according to my view, unnecessarily brought this action upon an unfounded charge of collusion between her mother and the defendants in adverse possession. If she had succeeded in establishing this collusion, she, under her rights as hitherto understood in our Courts, might have obtained a declaration in adjudication of issues of facts, without any reference to the date of the setting up of the will of her father, or of the existence of her mother. If plaintiff, however, had sued upon the ground that, irrespective of collusion, she has a right to put in issue the alleged will of

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her father, she would be required to sue within twelve years of the setting up of the said will; and as the cause of action on this ground arose to her during her minority, and under the law as construed by the decision dated 23rd May 1855, she might sue within 12 years of her majority, this action, being brought by her within that time, would have been in time. In such a case she could only sue for declaration, but not for possession as she has. Though Act VIII of 1859 allows Courts to modify plaints, I do not think that it can safely be done in this case, and to the extent required to be done. Although I see that, if she has to sue under any such right now in a new case, she would not be in time, as her action will be more than three years after her majority, I do not think it proper to grant any indulgence to the present plaintiff.

If it be decided that plaintiff has no cause of action at all in such a case, even if she were now suing within twelve years of the death of her father or mother, there is an end of the case. There would be no necessity even to say that the limitation, which has applied to the mother, has also applied to her right. It is a doubtful matter whether she, as against the stranger owing to the intervention of the widow after all, has any cause of action at all. If it is decided that she might sue after the death of her mother, not under Section 15 of Act VIII of 1859, but under general principles of Hindoo Law, she might be pemitted to sue because, if not allowed to sue now, it may not be easy for her to keep and produce evidence connected with the matters of fact likely to be put to issue if her case proceeds. She could not, however, be allowed to sue for possession, or even for a declaration, saying that the mother having become disqualified to sue, because she has not sued for twelve years, she, as the next heir, is now entitled to sue. That would be granting her a new right, not recognized either by the Regulation or by the Hindoo Law.

But it is clear that the views I entertain regarding the right to sue in this case are opposed to several leading decisions of this Court and of the late Sudder Court that the plaintiff laid her case in a different manner; and it is also clear that, on the merits, the fact of the silence and acquiescence of the mother, without any collusion, not found by the Lower Appellate Court as a fact, would be a most hopeless obstacle in the way of obtaining any decision on the merits favorable to the interests of the plaintiff. I think it, therefore, safe and proper to proceed according to the established precedents, and to decide that in this case, her right to sue is barred by the existence of her mother, and therefore dismiss the appeal with costs.

The 24th February 1864.

Present:

The Hon'ble H. V. Bayley and W. S. Seton-Karr, *Judges.*

Review of judgment—Second applications—Onus probandi.

Case No. 381 of 1863.

Regular Appeal from a decision passed by the Judge of Beerbhoom, dated the 27th April 1863.

Kasheenath Roy and another (Defendants) *Appellants,*

versus

Luckheenarain Chatterjee and others (Plaintiffs) *Respondents.*

Baboos Greesh Chunder Ghose and *Romanath Bose* for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

Suit laid at rupees 1,000.

Section 378 Act VIII of 1859 does not bar a second application for review of judgment being entertained after the dismissal of the first.

Whenever a petition for review of judgment is presented after 90 days, it is indispensable that the party preferring such petition should, in the first instance, account for the delay.

Raikes, J.—APPELLANTS' pleader did not enter on the merits of this case, but took a legal objection to the judgment being allowed to stand, on the ground that the Judge having first passed an order in the appellants' favor on the 31st December 1860, dismissing the claim of the plaintiff, and again on the 7th of December 1861, rejected an application of review filed by the plaintiff on the 18th of August 1861, had, on the presentation of a second application, admitted the case to review on the 7th of January 1863, and ultimately decreed the case for the plaintiff on the 27th April of the same year

Appellants' pleader argued that, by Section 378 Act VIII of 1859, no second application for review could be entertained by the Court below after dismissing the first, as Section 378 provides that the order of the Court, whether for rejecting the application or for granting the review, shall be *final;*

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secondly that, under the precedent afforded by the judgment of the Privy Council in the case of Maharajah Mohessur Singh *versus* The Bengal Government, an application to a Court for a review of its judgment must be presented within the time required by law for presenting such applications, or if not presented within the time prescribed, good and sufficient cause for the delay must be shewn to the satisfaction of the Court; that, in the present instance, although the law requires that "the application shall be made within ninety days from the date of the decree," the first application was not filed until the 18th of August 1861, or 7 months and 17 days after the 31st of December 1860, the date of the decree, nor the second application until the 13th of January 1862, or nearly twelve months from date of the judgment; and nowithstanding the proviso in the law which requires that the party who is after time shall show just and reasonable cause to the satisfaction of the Court for not having preferred such application within the limited period; and the Judge distinctly held that no such cause of delay had been made out, and upon that ground rejected the application; yet on the second time of making it, though no further cause of delay was adverted to, the Judge granted the review solely upon grounds affecting the merits of the judgment, and has thus, the pleader argues, contravened the law; and the judgment subsequently passed should, under the precedent of the Privy Council referred to, be set aside as null and avoid, and the previous judgment restored in favor of the appellant.

Upon the *first* point pleaded by the appellant as to the finality of any order passed on an application for review of judgment, we think the words bear a different construction from that put upon them in the arguments of the pleader. It appears to us that the Section only means to imply that the order, whether for rejecting the application or granting the review, shall not be open to appeal, and in that sense final. But as one of the grounds on which a review may be sought is defined in Section 376 to be the discovery of new matter or evidence not within the knowledge of the applicant or within his power to adduce at the time when the decree was passed, we do not think it could be intended to bar a review upon such obviously just ground, although a previous application upon some other ground before the discovery of new matter or evidence had been rejected. We are, therefore, of opinion that the first ground taken by the appellant is not tenable.*

Upon the *second* point, *viz.*, the authority of the Judge to grant a review on an application presented after the prescribed period of ninety days from the date of the decree, unless the delay was accounted for, we are of opinion that the law requires that such application be rejected.

The law upon this point is contained in Section 377 of the Procedure Code which provides as follows:—"The application shall "be made within ninety days from the date "of the decree, unless the party preferring "the same shall be able to show just and "reasonable cause, to the satisfaction of "the Court, for not having preferred such "application within the limited period."

Now, following the decision of the Privy Council in the case of Mohessur Singh, quoted by the appellant, which is strictly applicable to the present case, we may remark that, whenever a petition of review of any judgment is presented after ninety days, it is indispensable that the party preferring such petition should, in the first instance, account for the delay. The delay being satisfactorily accounted for, the review is to be granted, if, upon a consideration of the reasons stated, the circumstances of the case shall appear in justice to require it.

Now, to apply this view of the law to the present case, we find that the Judge, on the 7th December 1861, rejected the plaintiff's application of review which had been presented by him on the 18th August previous, because although plaintiff had accounted for the delay by stating that the documents he wished to submit for the consideration of the Judge were not available to him until after the expiry of the prescribed limit, the Judge held that being old official papers they had been just as available to the plaintiff when the case was previously tried as afterwards. The reasons stated therefore did not account for the delay, and he rejected the petition. So far, then, it appears to us the order of the Judge was correct. But on the 13th January following, another petition was presented calling the Judge's attention to the grounds upon which the review had been sought, namely, that the Judge had, in his judgment, erroneously dismissed the whole of plaintiff's claim for 512 beegahs, upon the ground of a previous decree by a Deputy Collector for 180 beegahs only, and it was pleaded by plaintiff that the decree relied upon could

* *See* Full Bench Ruling, 5 Weekly Reporter, p. 93.

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not possibly be held to affect the whole of his claim, and, upon the ground of this error in the decision previously passed by him, the Judge granted the review prayed for.

It appears to us, however, that, as the Judge had, in the first instance, rejected the application, because the cause of delay in presenting it was not explained to his satisfaction, he was not competent to enter upon a consideration of the grounds upon which the review was founded. Had the delay been accounted for to his satisfaction, he might then have proceeded further, and, if necessary, admitted the case to review; but his proceedings of the 7th December 1861 clearly shew that he did not hold there was any ground for delay made out. There was consequently no oversight on his part in omitting to consider the grounds of review which the application contained. He should not, therefore, have taken them into consideration on the petition preferred to him on the 12th January following.

We, therefore, come to the conclusion that the requirements of the law were not duly regarded by the Judge and have not been followed in admitting this case to a re-hearing on the 7th January 1863. The review then having been granted without due regard to the law as laid down in Section 377 of the Procedure Code, all that was done under it must fall to the ground. We therefore reverse the judgment passed by the Judge on the 27th April last, and restore that of the 31st December 1860 which dismissed the suit of the plaintiff. Plaintiff to pay all costs.

The 24th February 1864.

Present:

The Hon'ble Shumboonauth Pundit and G. Campbell, *Judges.*

Suit between Co-sharers—Account.

Case No. 1750 of 1863.

Special Appeal from a decision passed by Moulvee Syed Mahommed Rufiq, Principal Sudder Ameen of Bhaugulpore, dated the 11th March 1863, *reversing a decision passed by the Moonsiff of that District, dated the 31st May* 1862.

Goorodharee Singh and others (Defendants) *Appellants,*

versus

Honooman Singh and others (Plaintiffs) *Respondents.*

Baboo Nil Madhub Sein for Appellants.

Baboo Kalee Kissen Sein for Respondents.

Where a plaintiff claims over-payments from his co-sharers, and they plead other payments by themselves, the Court ought to go into the whole account between the parties, strike a balance, and decree accordingly.

Campbell, J.—We think that the Principal Sudder Ameen is entirely wrong in referring the parties to fresh litigation to settle the account, which he ought to have settled himself. Plaintiff claimed from his co-sharers certain over-payments. They pleaded certain other payments by themselves, and the Moonsiff, very properly going into the whole account between the parties, struck a balance and decreed accordingly. In appeal the Principal Sudder Ameen avoids going into the account, by saying "in such matters every one is at liberty to take steps separately to realize his dues," a doctrine wholly opposed to the modern, and indeed to any other procedure. We remand the case for a decision upon the whole account as decided by the Moonsiff. Costs to follow the result.

The 24th February 1864.

Present:

The Hon'ble H. T. Raikes and W. S. Seton-Karr, *Judges.*

Sale (by Mahomedan Widow)—Possession.

Case No 642 of 1862.

Regular Appeal from a decision passed by Moulvee Imdad Ali Khan, Principal Sudder Ameen of Tirhoot, dated the 18th September 1862.

Khajah Mahomed Gowhur Ali Khan (Defendant) *Appellant,*

versus

Shaikh Azeemoodeen (Plaintiff) *Respondent.*

Mr. C. Gregory and *Baboo Debendro Narain Bose* for Appellant.

Mr. A. F. Lingham and *Baboo Unnoda Pershad Banerjee* for Respondent.

Suit laid at rupees 6,301-1-9.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 20th February 1863.

Case No. 248 of 1863.

Khajah Mahomed Gowhur Ali Khan (Defendant) *Appellant,*

versus

Mussamut Gool Begum and others (Plaintiffs) *Respondents.*

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Mr. C. Gregory and *Baboo Hem Chunder Banerjee* for Appellant.

Baboos Dwarkanath Mitter and *Unnoda Pershad Banerjee* for Respondents.

Suit laid at rupees 14,834-3-19.

Case No. 249 of 1863.

Khajah Mahomed Gowhur Ali Khan (Defendant) *Appellant,*

versus

Mussamut Shurufunissa Begum (Plaintiff) *Respondent.*

Mr. C. Gregory and *Baboo Hem Chunder Banerjee* for Appellant.

Baboos Dwarkanath Mitter and *Unnoda Pershad Banerjee* for Respondent.

Suit laid at rupees 8,296-9-11.

By an order passed under Act XIX of 1841, *A* was declared entitled to take possession of a fourth share of her deceased husband *B*'s estate which devolved upon her according to Mahomedan Law. *B*'s nephew *C* sued to recover this share on the ground that *A* had been divorced, and this suit was pending when the present suit was brought by the purchasers of *A*'s rights. As *A* never took actual possession of her share under her decree, and *C* was in possession of the whole estate, —HELD that *A*'s vendees could not be placed in a higher position than their vendor was when *C*'s suit was brought against her, and that all that they were entitled to was the right to represent her in the pending suit.

Raikes, J.—WHEN these appeals were brought up for hearing, Mr. Gregory, on the part of the appellant, wished them to be postponed until the decision of another case, which had been heard by the Privy Council, and remitted to the Zillah Court, by order of that tribunal, for a re-trial on the merits.

It appeared, from the statements made to us by the pleaders on both sides, that the three appeals now before us related to suits which had been brought by the plaintiffs against Gowhur Ali Khan for possession of lands appertaining to the estate of Khodejah Begum, who, under an order passed conformably to Act XIX of 1841, had been declared entitled to take possession of a fourth share of the estate of her deceased husband. After that order was passed, Gowhur Ali Khan brought an action to recover this share of his deceased uncle's estate, on the ground that Khodejah Begum had been divorced and was thereby incapacitated from inheriting any part of her husband, his deceased uncle's property. This case was eventually carried in appeal to the Privy Council, and is now pending by an order of remand in the Zillah Court.

The plaintiffs in these actions before us in appeal are parties who have purchased from Khodejah Begum the share of the property descending to her from her husband, and their rights will of course follow any decision affecting the rights of their vendor. It appears, however, that, although Khodejah got an order under Act XIX of 1841 declaring her entitled to take possession of the share devolving upon her of her husband's estate by Mahomedan Law, she never took actual possession of it, and the estate somehow got into the hands of Gowhur Ali Khan, who now disputes the right of Khodejah's vendees to oust him out of possession, until the Courts have decided in the cases pending whether he is legally entitled to keep the entire estate of his uncle or not.

As it appears to us that the vendees of Khodejah cannot be placed in a higher position than their vendor was when Gowhur Ali's suit was brought against her ; all they can have at present, under their purchase from her, is the right to represent her in the suits pending. We therefore hold that, as the sales to them by Khodejah are not disputed, their validity may be held to be established, but that possession cannot be given until Khodejah's rights are set at rest in the suits now pending, in which Gowhur Ali Khan is a party. To this extent the Lower Court's orders will be upheld. Each party to pay his own costs in these appeals.

The 24th February 1864.

Present :

The Hon'ble Shumboonath Pundit and G. Campbell, *Judges.*

Partnership—Dissolution—Notice—Liability of Partners.

Case No. 1723 of 1863.

Special Appeal from a decision passed by Mr. J. W. Dalrymple, Judge of Purneah, dated the 11*th March* 1863, *affirming a decision passed by Baboo Gobind Chunder Chowdry, Principal Sudder Ameen of that District, dated the* 21*st June* 1862.

Shewram (Defendant) *Appellant,*

versus

Rohomutoollah (Plaintiff) *Respondent.*

Mr. R. E. Twidale and *Baboo Baney Madhub Banerjee* for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

When parties carry on business together and open current accounts with customers, they must, on dissolution of partnership, give full and fair notice of their

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dissolution to their customers, or otherwise be liable to them for all payments made by them in the partnership account to one partner in the belief that he represented the firm.

Campbell, J.—TAKING it to be a finding of fact of the Judge that, when the money was paid to Golab Chand after dissolution of partnership, "the plaintiff had no reason to suppose that he was not paying it to the old firm;" and, seeing that the plaintiff paid upon a *hath-chitta* or account current signed by Seroram, we think that the Judge's finding is justified in law. When parties carry on business together and open current accounts with customers, they must, on dissolution of partnership, give full and fair notice of their dissolution to their customers; and if they fail to do so, they will be properly liable to customers paying on the partnership account current to one partner in the belief that he represents the firm.

The appeal is therefore dismissed with costs.

The 24th February 1864.

Present:

The Hon'ble Shumboonath Pundit and G. Campbell, *Judges.*

Hindoo Families—Inheritance—Presumption—Onus probandi.

Case No. 1680 of 1863.

Special Appeal from a decision passed by Mr Rivers Thompson, Officiating Judge of Nuddea, dated the 28th February 1863, *modifying a decision passed by the Principal Sudder Ameen of that District, dated the* 21*st March* 1862.

Sonatun Misser and others (Defendants) *Appellants,*

versus

Ruttun Mallah *alias* Sookhoorda Debia (Plaintiff) *Respondent.*

Baboos Horokally Ghose and *Sham Lall Mitter* for Appellants.

Baboos Obhoy Churn Bose, Kishen Kishore Ghose, and *Bhoobun Mohun Roy* for Respondent.

The presumption is that all Hindoo families migrating to any place retain their old rites, customs, and laws of succession, until the contrary is proved.

Shumbhoonath Pundit, J.—THE most important issue in the case is whether the family of the parties to the suit, having been originally one of the North-Western Provinces, and accordingly governed by the Mithila School of Hindoo Law, has, since its migration to Bengal, changed its former customs and religious ceremonies and adopted those current in Bengal, so as to have become, with reference to the question of inheritance, subject to the Bengal School.

It is evident that on a point like this, as decided by this Court on the 30th December 1862, pages 534-39 of the Decisions for that year, the *onus* of proving the fact of old rites, customs, and laws of succession being abandoned, and new ones being adopted, lies upon the party making this assertion. The presumption is that all Hindoo families, migrating to another place, retain their old customs and religious ceremonies, &c., until the contrary is proved. In this case the Lower Appellate Court throws the whole *onus* of the issue upon special appellants, and further decides the case on misconceived construction of their answer. Reading the written statement of the defendants correctly, it is quite clear that they describe in the beginning of this paper, with reference to the state and facts connected with the birth and death of the members of the joint family, that a certain share of the joint property had, as a question of law, and not of fact, descended to a widow, and then came back to them through her. It is true there are statements in this defence inconsistent with the adoption of the Mithila Law in the family, but these were mere arguments to defeat the claim of the plaintiff. On the point of the principal issue in the case in the said answer, the defendants distinctly pleaded that, as is admitted on both sides, the family has all along been joint, and that, according to the law of the North-Western Provinces, women cannot succeed at all to the exclusion of male co-parceners.

As the Judge below has decided the case rather on an unfair construction of the written statement of the defendants, and has given more weight to arguments used by the special appellants in the said paper than to the evidence on the record; and as the Court has thrown the *onus* of the most important issue in the case on the wrong party, his decision cannot stand. The order of the Lower Appellant Court is, therefore, reversed, and the case remanded to the said Court to pronounce a fresh decision upon the issue with reference to the above remarks.

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The 25th February 1864.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Hindoo Law (Mitakshara)—Alienations by father—Limitation.

Case No. 298 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 31st March 1863.

Baboo Dabee Protapnarain Singh and others (Plaintiffs) *Appellants,*

versus

Monohur Doss and others (Defendants) *Respondents.*

Baboos Debendro Narain Bose and *Mohesh Chunder Chowdhree* for Appellants.

Mr. R. T. Allan and *Baboos Kishen Succa Mookerjee* and *Kalleekissen Sen* for Respondents.

Suit by sons under the Mitakshara Law to set aside alienations by their father as made without legal necessity and to supply the father's extravagance.

The plaintiffs having adduced no distinct evidence in support of their allegation, and having omitted for 20 years to impeach the titles of the purchasers, the alienations were held valid against them.

A son under the Mitakshara Law, whatever right he may have during his father's life-time, may, within 12 years from his father's death, sue to recover ancestral property improperly alienated by the father.

Morgan, J.—THIS is an appeal from a decree of the Principal Sudder Ameen of Sarun dismissing the suit of the plaintiffs (appellants). The suit was brought by the plaintiffs, the two sons of Baboo Lall Narain Singh, to recover from the several defendants various portions of ancestral property which had been sold or mortgaged by the father between the years 1831 and 1838. These alienations being, as they alleged, made not for any necessary or proper purposes, but to supply the father's extravagance, did not bind them. They, therefore, brought this suit after their father's death to recover the property. It was not distinctly proved at what time the appellants became of age. They were probably both minors in the year 1831, and had both attained their majority in the year 1838. During that time and long subsequently, they lived with their father, whose death did not happen until the year 1859. It is vaguely stated that they quitted their father's house at some period before his death, but none of the witnesses attempt to fix the time, and the evidence leaves the alleged fact of their departure from his house very doubtful.

The Principal Sudder Ameen decided (1) that the suit of the plaintiffs was not barred by the Law of Limitation, having been brought within 12 years from the death of the father; (2) that the father's alienations were valid and effectual against his sons, the plaintiffs.

Upon the hearing of this appeal of the plaintiffs (appellants) against the Principal Sudder Ameen's decision upholding the alienations, the respondents objected (under Section 348 of the Code of Civil Procedure) to the decision of the Lower Court upon the Law of Limitation. Both questions have been argued before us. We will first consider the appellant's ground of appeal.

The appellants contended that, by the Hindoo Law applicable to this case (the Mitakshara), their father's alienations of the ancestral property were void against them. They gave general evidence to show the extravagant habits of Baboo Lall Narain Singh. They relied on the form of the deeds, most of which contained no statement to show that the particular sale, &c., was for the purpose of raising funds for any necessary object. They also relied on the absence of their own names from the deeds, their consent being in no way indicated therein. Above all, they insisted that the burthen of proving the validity of these alienations rested on the several respondents, who had wholly failed to support them. The following passage from the judgment of the Privy Council in the case of Hunnoomanpersaud Panday's case (6 Moo. Ind. Ap. 393) was cited:—"Their Lordships think "that the question on whom does the "*onus* of proof lie in such suits, as the present is one not capable of a general and "inflexible answer. The presumption proper "to be made will vary with circumstances, "and must be regulated by, and dependant "on, them. Thus, where the mortgagee "himself, with whom the transaction took "place, is setting up a charge in his favor "made by one whose title to alienate he "necessarily knew to be limited and qualified, he may be reasonably expected to "allege and prove facts presumably better

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"known to him than to the infant heir, "namely, those facts which embody the re-"presentations made to him of the alleged "needs of the estate, and the motives in-"fluencing his immediate loans."

The several respondents each gave material evidence to prove the circumstances attending the advance of money by him to the father. In some cases the advance was to satisfy decrees obtained against the father, in others for marriage or other family expenses, in others for costs of law suits and payment of the Government revenue. Upon many occasions, the witnesses say, the appellants themselves were present at the time of the loan.

The present condition of the property alienated is this: in some instances, the property (after foreclosure of mortgage) has passed into the hands of persons who were probably strangers to the circumstances of the original loan; in other instances the purchaser or the mortgagee (having foreclosed) still holds the property, and may reasonably be expected to know and to be prepared to prove the facts connected with his own particular loan. After making due allowance for the difficulty of proof in the former cases, we are disposed to hold that the evidence adduced by each of the respondents falls short of establishing a clear case in support of his incumbrance to its full extent. But we are not now to decide upon such evidence alone. The conduct of the appellants during the many years preceding their father's death must also be considered. If any presumption arises from such conduct in favor of the respondents, they are entitled to the benefit of it. The appellants cannot, in such a case as the present, throw upon the respondents the whole *onus* of proof. The appellants allege that the ancestral estate was alienated without their consent and to supply the father's extravagance. They offer no distinct evidence in support of this allegation. They do not even specifically state the nature of their objections to any of these alienations, or inform us which of the several sales are impeached because made needlessly and improperly during the infancy of the appellant, and which are impeached because made without their consent or against their wishes, after they had attained their majority. The antecedents of their father's career must be within their knowledge, for they were living with him and were probably of age at the time of many, if not of all, the sales; yet they offer no evidence (beyond general evidence of his extravagance) to show that the monies advanced were advanced and applied to supply his extravagance, and not for necessary and proper purposes. All these alienations have been well known to them for many years, if not from the time of their dates, and we think that they have by their conduct acquiesced in and shown their consent to them. Even this suit was not brought for three years after the father's death. The evidence adduced by the defendants respectively of the circumstances attending their several advances (including, in many instances, evidence that the appellants were themselves present at the time of the advance) taken with the acquiescence of the appellants for so many years, furnishes, we think, proof sufficient to entitle them to a decree.

With regard to two of the alienations, the appellants rely on certain proceedings taken by them to show that they actually opposed these alienations. They presented petitions to the Collector and to the Registrar of Deeds, praying that the deeds should not be registered, and that the new proprietor's name should not be recorded. This was about the end of the year 1838. Their petitions having been refused, they commenced a suit against their father and against one of the purchasers, alleging that their father was wasting the ancestral property, and ought to be deprived of the management of such portion of it as remained. The Principal Sudder Ameen dismissed the suit, at the same time observing that, if the sales made by the father were illegal, the plaintiffs might sue to have them set aside. Previous to the suit just referred to, the father had instituted suits against one or more of the persons to whom he had made conditional sales, in order to recover from them the full sums agreed to be advanced to him, only portions thereof having, as he alleged, been really advanced. These suits were dismissed, and the sales became absolute. Shortly before the conclusion of this litigation by the father, the suit mentioned above, brought by the sons against him, was commenced. The father and the sons were, we may fairly presume, at this time living together, and continued to live together. We are not without doubts as to the good faith of these proceedings by the latter. Assuming that the sons so acted in order to show that their father's dealings with the ancestral property were disapproved of, and not consented to, by them, what effect should now fairly be given to their

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conduct? The proceedings were in point of time subsequent to the alienations; and they were not followed up by any further attempts to impeach the titles of the purchasers. For the last 20 years, the appellants have not, by suit or otherwise, questioned those titles. We think that the appellants cannot now rely on such proceedings to repel the inference that arises against them from their long subsequent inaction and apparent acquiescence.

Several of the respondents are purchasers of property sold (so long ago as the years 1838—42) in execution of decrees against the father. Nothing was proved to affect their rights. The appellants having failed to show any valid ground of objection to the decision of the Lower Court, we dismiss their appeal.

The respondent's objection to the decree is founded on the Law of Limitation. Our decision in their favor, upon the other ground, renders it strictly unnecessary to dispose of this objection, and it may be sufficient to say that, by two decisions of the Sudder Court (1857, p. 67; 1851, p. 352) it has been determined that (whatever right of suit the son may have during his father's life-time) he may, within 12 years from his father's death, sue to recover ancestral property which his father has unduly alienated. His interest in the ancestral property from the time of his birth, is certainly held sufficient to entitle him to maintain suits for its protection during his father's life-time. The son's right, even to a partition of ancestral property during the father's life, is supported by authority (*see* No. 8, s. 5, ch. 1, Mitakshara, p. 279, and Stokes' Madras Reports, p. 77); and this, without proof of waste or misconduct, by the father.

It is now argued for the respondents that the father and son, according to Mitakshara Law, are joint owners of ancestral land; and that they hold such land in the same way as two Hindoo brothers joint in estate hold their joint landed property; and that, for the purposes of the Law of Limitation, the wrongful alienation by the father alone (the son not being a minor) puts the latter to his rights of suit immediately upon such alienation, and that all suits by him are barred after 12 years. Without attempting to define the precise nature of the son's estate or interest, we may remark that it would be strange if a purchaser who buys from one whose title to alienate he knows to be limited and qualified, should ordinarily be held entitled to the benefit of the Law of Limitation against persons in the position of sons under the Mitakshara Law. It is enough for us, in the present case, to say that the decisions quoted must be followed by us.

We confirm the decree of the Lower Court, and dismiss this appeal with costs.

The 26th February 1864.

Present:

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

Judgment (of Lower Appellate Court.)

Case No. 1240 of 1863.

Special Appeal from a decision passed by Baboo Sreenath Bidyabagish Pundit, Principal Sudder Ameen of East Burdwan, dated the 13th February 1863, affirming a decision passed by the Moonsiff of that District, dated the 16th May 1861.

Roop Chand Roy and others (Defendants) *Appellants,*

versus

Ram Kant Kobeeraj and others (Plaintiffs) *Respondents.*

Baboos Nobeen Chunder Dey and *Bhuggobutty Churn Ghose* for Appellants.

Baboos Huro Kalee Ghose and *Sham Lal Mitter* for Respondents.

Section 359 Act VIII of 1859 requires the points for determination, as well those in appeal as those in the original pleadings, to be stated, and the reasons upon which the decision is arrived at thereon.

Bayley, J.—In this case the Principal Sudder Ameen, Sreenath Bidyabagish Roy Bahadoor, has recorded his judgment in these terms, *i. e*, that, after hearing pleaders and perusing the record, the decree passed by the first Court agreeably to the reasons assigned in that decision is proper; that the appellant from that decision raised some objections which were worthless; and that plaintiffs were illegally dispossessed. Three issues were raised by the first Court, and a finding come to on them.

In the Lower Appellate Court, however, no issues as arising from the grounds of appeal are specified; nor even is generally the nature of the objections raised stated, but a bare finding that they are worthless, and a verdict for plaintiffs.

The point taken in special appeal here is that such a decision is erroneous in law; that Section 359 Act VIII of 1859 requires the points to be decided, as well those in appeal as those in the original pleadings, to be stated, and the reasons upon which

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the decision is arrived at thereon, and that this has not been done in this appeal. On the other hand, the case of Shaikh Nashur Ali, page 425, Decisions of the High Court, March 1863, has been cited to shew that a decision merely stating that the Court declines to interfere with the judgment of the Court below, is enough.

We think the objection of special appellant valid, because what the points to be decided from the pleadings *in appeal* were are not stated in any way by the Principal Sudder Ameen, not even generally; and this is an error in law in procedure under Section 359 Act VIII of 1859. That the case above cited was of the nature of this one is not shewn to us.

We, accordingly, remand the case for re-trial, and request the Principal Sudder Ameen will be more careful in future.

The 27th February 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Mortgage (by Executor).

Case No. 403 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 18th May 1863.

Kalee Narain Roy Chowdhry (Plaintiff) *Appellant,*

versus

Ram Coomar Chand and others (Defendants) *Respondents.*

Baboos Dwarkanath Mitter and *Onookool Chunder Mookerjee* for Appellant.

No one for Respondents.

Suit laid at rupees 12,182-14.

Where, in order to save an estate from sale in execution of a decree against the testator, his executor raised a loan from the plaintiff giving him a mortgage of the testator's property,—HELD that, even if the executor had funds to pay plaintiff off the debt without raising a loan, that fact would not invalidate the plaintiff's claim against the estate, unless there was good reason to infer that he knew of those funds, or might have known of them if he had exercised ordinary diligence in making enquiries on the point.

Steer, J.—This is a suit upon a mortgage bond executed in favor of the plaintiff by the defendant, Ram Coomar Chand, in his capacity of executor to the estate of Mirza Mahomed, deceased. The facts appear to be these:—

Mirza Mahomed was indebted to one Padree Greg ry in the sum of 7,260 rupees. The Padree sued him and got a decree against him on the 3rd January 1857. On the 9th November 1859 he caused the estate of Mirza Mahomed to be advertized for sale in execution of his decree. On the 19th November 1859, Ram Coomar, the executor to the estate of the said Mirza Mahomed, borrowed a sum sufficient to pay off the decree to the above-named party from another Padree, giving him a mortgage of the testator's property. This party sued upon the loan and got a decree, which he took measures to enforce by the sale of the estate, which was fixed to be held on the 8th January 1861. On the 5th January 1861, Ram Coomar executed, in favor of the plaintiff in this suit, the mortgage bond upon which he now sues.

Thus it will be clearly seen from the above narrative that the loan obtained for the plaintiff was in fact obtained for the purpose of paying off liens which had been successively contracted in order to meet one and the same original demand against Mirza Mahomed himself.

Ram Coomar admitted the bond, and it is not denied by the other defendants, the heirs of Mirza Mahomed; but they dispute the right of the plaintiff to hold the estate liable on the ground that the loan was not contracted to save the estate, inasmuch as at the time a large amount of money was in the custody of the executor.

Such is the defence, and it narrows the case into a very small issue, *viz.*, was there, in the knowledge and within the means of knowledge of the plaintiff, such a sum in the executor's hands as rendered him independent of a loan.

As evidence that there was such a sum, the pleader for the defendants points to a decision of the Principal Sudder Ameen of date the 14th April 1863, on which the Lower Court has mainly relied, and on which it has been found on an action of account and for removal of the executor instituted by the defendants, that Ram Coomar, the executor, is indebted to the estate up to the date of the said decree, for sums unaccounted for to the amount of rupees 11,766.

Now this is no evidence that, when Ram Coomar gave the several mortgages, he had money in his hands sufficient, without the aid of any loans, to pay the debts of the testator. Nor indeed, if the fact was so that Ram Coomar had the money to pay the prior mortgage without any actual necessity for borrowing from the plaintiff, would that fact invalidate the plaintiff's claim

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against the estate, unless there was good reason to infer that plaintiff knew of these funds, or might have known of them if he had exercised ordinary diligence in making enquiries on the point. But there is nothing whatever which goes to show that Ram Coomar had any funds, or that the plaintiff knew or might have known that he had them.

The plaintiff saw that there was that pressure upon the estate, a pressure arising out of a liability contracted for the purpose of paying a debt due from the testator to himself, and that the estate would assuredly go to the hammer unless money was raised to relieve the estate. As a prudent man he acted in the case, for he took from the executor the prior liquidated mortgages before he advanced the money to relieve the estate. There is no reason whatever to suppose that he was otherwise than under an honest conviction that the estate was in jeopardy; and allowing that it was his duty, before he made the advance, to see if Ram Coomar had power to raise money and to bind the estate, we think that he had quite sufficient grounds to be satisfied on this head. Ram Coomar was, without any doubt, the sole manager. He was so recognized by the Courts, and he plainly acted as the sole manager. As sole manager he had contracted loans on mortgage, and paid them off by other loans. These redeemed loans he had in his hands and made over to the plaintiff. There was therefore no room for any doubt or suspicion on the part of the plaintiff as to Ram Coomar's powers, and indeed, the defendants themselves concede to him the power, but only deny the necessity for the loan.

The justice of the plaintiff's claim then seems to be so clear that the endeavor to evade it on the part of the defendants is anything but honest. As an executor, Ram Coomar had most undoubtedly the power to bind the estate to pay off the debt of the ancestor, and it is also clear that he acted throughout for the benefit of the estate. If he had not given the first mortgage to the Padree, the estate would have been sold for the debt of the ancestor, and the property would for ever have been lost to the heirs. If he had not given the second mortgage, the estate would in like manner have been sold to satisfy the first mortgage; and if he had not given the third mortgage to the plaintiff to satisfy the second mortgage, it would have been sold to satisfy that lien. The debt of the ancestor was an inevitable charge upon the estate. The executor did not create it, and it must have been satisfied. In every act, so far as the plaintiff could judge, and so far as the world had the means of judging, there was a pressure under which every successive act was done; and had not the executor done what he did, the defendants, the heirs of the original debtor, would have been without their estate. It is therefore in every way equitable that the estate which has been benefited by the plaintiff's money should be charged with the repayment of that money.

We think it unnecessary to notice an argument which the pleader for the defendants, the respondents, tried to raise as to the power of Ram Coomar to contract loans under the terms of the will which appointed him the executor; for, as already stated, the power to raise loans for necessary purposes is conceded in the answer, and we cannot allow an argument to be raised in direct opposition to that concession.

Nor can we be influenced by another decision of this Court in which it is said to have been found as a fact that Ram Coomar was not the executor when he contracted the loan on account of which the suit was brought, for this is not a matter raised in the pleadings, and every case must be considered and disposed of according to its own pleadings. Nor do we know any of the circumstances of that case, or whether, at the time the loan from the plaintiff was obtained, Ram Coomar had ceased to be executor. If this was so, the defendants should have pleaded it. But so far from any such objection being raised, the defence went on the fact of Ram Coomar being the admitted executor, but it denied that Ram Coomar had any necessity to borrow.

On these grounds we reverse the judgment of the Lower Court, giving the costs of the plaintiff and the costs of Ram Coomar against the other two opposing defendants.

The 29th February 1864.

Present:

The Hon'ble G. Loch and J. P. Norman, *Judges.*

Jurisdiction—Two suits for same subject matter.

Case No. 232 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 29th January 1863.

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Sheoprosun Misser (Defendant) *Appellant*,

versus

Maharajah Rajender Kishore Singh (Plaintiff) *Respondent*.

Baboos Unnoda Persad Bannerjee and *Kali Mohun Doss* for Appellant.

Messrs. S. J. Leslie and *J. Baptist*, *Moonshee Ameer Ali*, and *Baboo Baney Madhub Bannerjee* for Respondent.

Suit laid at rupees 1,19,288-13.

Held that this suit should not have been allowed to go on while an appeal relating to the same property and between the same parties was pending before the Privy Council.

Loch, J.—PLAINTIFF sues to recover possession of Mouzah Pursa Bissumbhur and others mentioned in the plaint on the allegation that they appertain to his zemindary, and that defendant is now holding adverse possession to him under the following circumstances:—On 5th Assin 1258, the defendant executed a kubooleut in the plaintiff's favor and entered upon possession. Failing to pay his rent, the plaintiff brought a suit against him for the arrears in the Collector's Court. The Collector held that the kubooleut was not proved, and dismissed the suit. Plaintiff then brought an action in the Civil Court to set aside the summary decision, to recover the rent due on the kubooleut, and, as the term of the lease had then expired, to enter upon possession and to obtain mesne profits. The first Court dismissed his suit for rent, but gave him a decree for possession. Both parties appealed, and the Sudder Court on 31st July 1858 confirmed the judgment of the Court below in regard to the rent, and passed an order of non-suit as regards the claim for possession. Plaintiff then appealed to the Privy Council against this order of non-suit, and that appeal is still pending. In the meantime he has brought the present action to recover possession by setting aside the allegation of Bekh Birt under which the defendant retains possession.

The Principal Sudder Ameen gave plaintiff a decree for possession and mesne profits, holding that the pendency of the appeal before the Privy Council was no sufficient bar to the institution of the present suit.

We think that this suit should not have been allowed to go on while an appeal relating to the same property and between the same parties was pending before the Privy Council. Both public policy and justice require that parties should not be harassed by unnecessary litigation. It is true that the provisions of Section 12 Regulation III of 1793 have not been re-enacted in Act VIII of 1859, and no provision for a case, such as the present, is made in that Code. But we think that the rule that a defendant shall not be harassed by two actions for the same subject matter is not a mere matter of procedure, but is founded on general principles of law and public policy. At the same time we are not now compelled to dismiss the second suit at once as we should have been, had Section 12 Regulation III of 1793 still been in force.

We therefore order that this appeal do stand over till the decision of the Privy Council in the case before it has been passed. If that decision be favorable to the plaintiff, this Court will have to consider whether this case should not be struck off with all costs. If, on the contrary, the decision of the Privy Council affirm the judgment of the late Sudder Court, then this Court will have it in their power to allow the present case to go on, and plaintiff will be saved the expense of instituting a fresh suit. But under no circumstances will he be allowed to recover costs in both cases, as we hold that the present litigation was unnecessary; and if the defendant, in execution of the decree passed by the Lower Court on 29th January 1863, has been deprived of possession, he will be instantly restored to possession.

The 29th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges*.

Hindoo Law (Mitakshara)—Widow of a member of a divided Family (Alienations by).

Regular Appeals from a decision passed by the Principal Sudder Ameen of Patna, dated the 29th November 1862.

Case No. 121 of 1863.

Ram Kishen Singh (Plaintiff) *Appellant*,

versus

Cheet Banoo and others (Defendants) *Respondents*.

Baboos Kishen Kishore Ghose, *Kalee Prosunno Dutt*, and *Kalee Mohun Doss* for Appellant.

Mr. J. Baptist, *Moonshee Ameer Ali*, and *Baboo Onookool Chunder Mookerjee* for Respondents.

Suit laid at rupees 5,506-15-10.

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Case No. 160 of 1863.

Bulwunt Narain Singh (Defendant) *Appellant,*

versus

Ram Kishen Singh (Plaintiff) *Respondent.*

Baboos Onookool Chunder Mookerjee and *Unnoda Pershad Bannerjee* for Appellant.

Mr. S. J. Leslie and *Baboo Juggodanund Mookerjee* for Respondent.

Suit laid at rupees 3,726-11-10-10.

Case No. 162 of 1863.

Cheet Banoo (Defendant) *Appellant,*

versus

Ram Kishen Singh (Plaintiff) *Respondent.*

Baboos Unnoda Pershad Banerjee and *Dwarkanath Mitter* for Appellant.

Mr. S. J. Leslie and *Baboo Juggodanund Mookerjee* for Respondent.

Suit laid at rupees 5,506-11-10-10.

The widow of one of the brothers of a divided Hindoo family governed by the Mitakshara Law does not acquire an absolute interest in her husband's separate estate, but only such an interest as would render her acts conveying her interest to a third party binding as against herself, but not as against the reversionary heirs. unless the alienations were made under legal necessity.

* * * * * * * *

Kemp, J.—HAVING found that the alienations made by the widow were justified as made under legal necessity, it is unnecessary to notice at any length the argument of the pleader for the appellant that the widow had an absolute title in the estate which she inherited from her husband. As the widow of one of the brothers of a divided Hindoo family governed by the Mitakshara Law, she would inherit her husband's separate estate, and acquire in it such an interest as would render her acts conveying her interest to a third party binding as against herself, but not as against the reversionary heirs, unless the alienations were made under legal necessity. The pleader has not been able to show us any precedent or text of law supporting the argument he contends for.

The 29th February 1864.

Present:

The Hon'ble H. T. Raikes and W. S. Seton-Karr, *Judges.*

Limitation—Suit by Government on total failure of natural heirs.

Case No. 188 of 1863.

Application for review of judgment passed by the Hon'ble Justices Raikes and Seton-Karr on the 13th of January 1863 in Special Appeal No. 61 of 1861.

Pursun Lal and others, *Petitioners,*

versus

The Government, *Opposite Party.*

Messrs. G. Plowden and *C. Gregory,* and *Baboo Kalee Prosunno Dutt* for Petitioners.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Opposite Party.

The period during which Government may sue on total failure of natural heirs dates from the time when failure of heirs or reversioners became apparent. In the case of parties without any legal title, a possession of 60 years, and not of more than 12 years, is necessary to create a title.

Seton-Karr, J.—THIS is an application for review of our decision dated January 13th, 1863, and notice having been issued to Government, respondent before us and plaintiff in the original action, the case has been very fully argued on both sides.

The particulars of the litigation will be found described at page 115 of the 3rd Volume of the Select Reports of the late Sudder Court, and they are further recapitulated correctly in the Judge's decision which our original order confirmed, and which we are now asked to set aside.

The Government suit relates to the property of two brothers, Ram Dyal and Gunesh Dutt, who lived in joint possession of an undivided estate, and who were eventually succeeded by the widow of the former, Mussamut Sipphool. According to the provisions of the decree of 1821, the Government now claims on total failure of natural heirs, and a decree has been given in its favor against persons claiming to be the representatives of Gunesh Dutt, one of the brothers.

The claim of these persons has been argued before us, both on this and on the previous occasion, not on the grounds of inheritance, but on those of limitation; but one main ground of argument on this head is entirely cut away by the fact that Government did not sue, and was not intended to sue, until the failure of natural heirs or representatives placed it in the position contemplated by the decree of 1821.

Now this contingency did not occur until 1849, when the late Sudder Adawlut, in special appeal, virtually confirmed a decision of the Zillah Court of the 17th of July 1846, page 63 of the Zillah Decisions for Tirhoot. Within this limit the Government are fully in time, having sued in 1853, and this renders it unnecessary for us to determine a point raised by the applicants for

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review to the effect that Government, if it had not sued within twelve years from the death of the widow Sipphool, could not be entitled to the extended period of 60 years, as this was not a suit "for the recovery of "the public revenue, or for any public right "or claim whatever" (Section 2 Regulation II of 1805).

We say again, as we said in our last judgment, that the period within which it became necessary for Government to sue, must date only from the time when failure of heirs or reversioners became apparent, and this point was not conclusively established till the decisions of 1846 and 1849.

It is, however, argued by Mr. Plowden, as it was argued by Mr. Piffard, when he lately obtained an order to summon the Government as respondent into Court, that this reasoning will only apply to one-half of the property which Sipphool enjoyed as the widow of Ram Dyal, and that it cannot cover the other half to which the applicants would be entitled as the heirs of Gunesh Dutt, and of which they have certainly been in long, peaceable, and unchallenged possession ever since 1810.

We have paid the fullest attention to the arguments employed to secure for the applicants this one-half of the property; but we observe, first, that any neglect of Sipphool to sue for this moiety, as she was permitted and expected to do, will not create a title in the applicants nor estop the Government from claiming its rights on total failure of heirs; and next that, in the case of parties who have no legal title, a possession of 60 years, and not of more than 12 years, must be set up in order to bar and defeat all other claims.

According to the ruling of the Privy Council in the case of Rajah Enaet Hossein, page 238, Volume VII of Moore's Reports, the pendency of litigation, as already observed, justifies a party or claimant in waiting for the issue of that litigation; and as the Government could not sue until the question of heirs to the property had been set at rest, it is justified in suing, not only for the share of Ram Dyal, but also for that of Gunesh Dutt, unless the parties in possession can establish either a possession of 60 years sufficient to create a title, or else a title created by some specific act of Ram Dyal in his life-time. Now the first ground is not attempted to be supported; and, as to the second, it is only shewn that Ram Dyal permitted the names of the heirs of Gunesh Dutt to be registered in the Collectorate. But we are now dealing with a case in which the facts must be found by the Lower Courts, and in which they have been found accordingly; and when we see that there is a distinct judicial finding of the Judge that the estate was joint and undivided, and that there was no separation which could enable the heirs of Gunesh Dutt to hold distinctly from Ram Dyal, and that the Judge, in expressing this opinion, followed correctly the decision of the Court in 1821, we can only say that any possession by the appellant since 1810 must have been possession by sufferance; that no title was created by any act of Ram Dyal; and that none could arise out of any neglect on the part of his widow.

It may, no doubt, be very hard for the appellants who have been in possession for more than 40 years before the date of suit, to be now ousted by Government as reversioner. But we can only say that Government appears to us to have the law on its side; and if those charged with looking after the interests of the estate, choose to avail themselves of their dry legal rights, we can only treat them as we would treat any other claimant, and award to them what the law recognises as their strict legal dues.

In this view, even as regards the other moiety of the property, we see no reason to change our opinion, but we must allow Government to take possession of the whole. We, therefore, refuse to modify our former decision, and reject this review with costs.

The 29th February 1864.

Present:

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

Joint Hindoo Family—Purchase in son's name — Presumption — Onus probandi (separate estate.)

Case No. 401 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 26th May 1863.

Sreemuttee Poorniimah Chowdhrain and others (Plaintiffs) *Appellants,*

versus

Dropodee Dossee and others (Defendants) *Respondents.*

Baboos Oprokash Chunder Mookerjee and *Onookool Chunder Mookerjee* for Appellants.

Baboos Dwarkanath Mitter and *Gopal Lall Mitter* for Respondents.

Where a father and son live as a joint family, and property is purchased in the name of the son, the presumption is that the property was joint estate and purchased in the name of the son, with a resulting trust in favor of the father. The burden of proving that it was separate estate is on those who claim it as such.

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Trevor, J.—PLAINTIFFS Sreemuttee Poornimah Chowdhrain and others sue Sreemuttee Dropodee, Sreemuttee Dossee, and Issur Chunder Shah, and also Lukeekant Poddar and Nobin Chunder Shah, for the reversal of certain summary orders passed in execution of decree, and a declaration of the liability of certain properties to be sold in execution of their decree by the cancelment of a fraudulent deed of gift, and a fraudulent deed of sale propounded by the defendants.

Plaintiffs allege that Radhanath Shah, the father-in-law of the defendants Nos. 1 and 2, and Hurry Shah, the father of defendant No. 3, opened a firm in their joint names at Naraingunge as dealers of salt, and became involved in debt to them, plaintiffs, and other merchants; that the said Radhanath, with a view to evade the payment of the said monies, executed a deed of sale in the name of Sreemuttee Dossee, the wife of his son Raj Chunder Shah, of his own dwelling-house and garden valued at Rs. 6,000 on the 3rd Srabun 1255, and, having kept the said properties in his possession, died; that after his death they were in possession of Hurry Shah defendant, father of defendant No. 3, who subsequently died in possession; that afterwards Raj Chunder Shah, the husband of defendants Nos. 1 and 2, and Issur Chunder, re-opened the firm of their father's in the name of Radha Mohun and Issur Chunder, took salt from defendants, and carried on their business; that being indebted, Raj Chunder, with a view to evade the payment of monies owing by his father and him, executed a deed of gift of the remaining properties left by his father in the name of his wife, the defendant Sreemuttee Dropodee Dossee, on the 22nd Falgoon 1258, and having retained the properties in his own possession died; that plaintiffs subsequently brought a suit against defendants Sreemuttee Dropodee and Sreemuttee Dossee, the guardian of the minor son of Raj Chunder and defendant Issur Chunder, to recover the outstanding balances in the account books of both the firms above alluded to and obtained a decree; that it appears that, in a previous suit brought by Gobind Chunder Paul Chowdry, in which the properties now sought to be brought to sale were attached, plaintiffs brought forward certain collusive deeds of gift and sale, and obtained the release of their properties on the strength of them; that consequently, when plaintiffs in their suits attached the property in execution, the defendants again set up their claims, producing the proceedings in execution in the previous case dated 26th November 1861; that the defendant's claims were, regard being had to those orders, again admitted on the 29th May 1862; that, as there is no other means than a regular suit in Court for setting aside those fraudulent deeds, and the summary decision establishing them, they, plaintiffs, now sue, praying that those deeds may be declared fraudulent, the summary decision reversed, and that possession be given to them, to realize the sums due under their decrees by the sale of the properties in the schedule annexed to the plaint.

The defendants Sreemuttee Dropodee and Sreemuttee Dossee in their written statement allege that the two landed properties claimed were purchased by their husband Raj Chunder from his own funds in 1250 and 1252, or 1843 and 1845; that subsequently in 1258 or 1851, in presence of his father Radha Mohun, and whilst he, Raj Chunder, was in possession of them, they conveyed them to the defendant Dropodee by a deed of gift; that she held possession of them as proprietress until Assin 1269, when she sold them to Lukeekant Poddar, who is now in possession. As to the other properties and pucca house, &c., which plaintiffs desire to have sold, they allege that they originally belonged to Radha Mohun Shah, the father-in-law of the defendant Sreemuttee Dossee, who, for the consideration of rupees 6,000 paid from her *streedhun*, conveyed it to her under a deed of sale dated 3rd Srabun 1255 or in 1848; that of these properties the pucca house she sold to Nobin Chunder Shah in Assin 1269, who now possesses it, and that the remainder are in her possession; that at the time of sale to her, Radha Mohun was not indebted; that consequently, under no circumstances, can the deed be set aside as collusive.

The defendants Lukeekant Poddar and Nobin Chunder Shah separately claim the properties alleging them to have been sold to them. The former, Lukeekant, alleges that Raj Chunder Shah, the judgment-debtor, has no right and interest in the talooks sought to be brought to sale, but that having been purchased by him, Raj Chunder, originally and transferred by deed of gift to Dropodee by him, they were sold to him by that lady for Rs. 4,000, the portion of a decree passed against Raj Chunder, and purchased by him, and has since been in his possession. The latter, Nobin Chunder, avers that the buildings in his possession, having been sold to the defendant Sreemuttee Dossee by Radha Mohun for Rs. 6,000, were sold by that lady to him in satisfaction of a decree passed against Raj Chunder Shah, and are now in his possession, and cannot be interfered with by the plaintiffs.

The Principal Sudder Ameen on the above pleadings laid down the following issues:—

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1st, did the properties belong to the judgment-debtors? and 2nd, had the judgment-debtors, to defraud the decree-holders, made nominal and fraudulent alienations, or were the transfers of the properties to Lukeekant and Nobin Chuder *bonâ-fide*?

The Principal Sudder Ameen was of opinion that the decree in the enforcement of which the plaintiffs asked for the sale of the properties was against Issur Chunder for self and Raj Chunder as heirs to his deceased father Radha Mohun. Moreover, it appeared to him that the documentary and oral evidence adduced by defendants, clearly proved that the talooks which Dropodee avers to have been conveyed to her by deed of gift were purchased by Raj Chunder from his separate funds, and that consequently, as Raj Chunder is not liable in any character, save as the heir of his father, these properties acquired by him from his own funds and in the possession, admittedly collusive, of the defendant Lukeekant, cannot be brought to sale. As to the remaining properties which were admittedly Radha Mohun's, the Principal Sudder Ameen altogether discredited the sale of them to Sreemuttee Dossee by him for Rs. 6,000, and also the *bonâ-fide* transfer by her to Nobin Chunder subsequently of a portion of them. He therefore dismissed so much of the plaintiff's claim as refers to the two talooks, and decreed the sale of the properties alleged to have been purchased by the defendant Sreemuttee Dossee, partly in her possession, and partly in that of the defendant Nobin Chunder, with costs in proportion.

An appeal is now preferred by the plaintiffs below against so much of the decision of the Principal Sudder Ameen as is adverse to them, and taking advantage of Section 348, the respondent Nobin Chunder Shah objects to that portion of the decision which is adverse to him. The whole case is consequently opened out before us.

From the statements of the plaintiffs in this case, and the decree on which appellants present claim is based, it is quite clear that the properties in suit would escape their being brought to sale if it could be shown that they passed into the hands of the present possessor of them *bonâ fide* and for valuable consideration, and that the proceeds had been expended in the satisfaction of a decree in which Raj Chunder was liable, either personally or as heir to his father: but such a state of things is not attempted in the present case. These properties, it is admitted, passed into the hands of the present possessors only by transfer in account as it were, in other words in nominal satisfaction of portion of a decree against Raj Chunder bought by the defendants. Now, considering that these so called alienations are made, as observed by the Principal Sudder Ameen, to a near relation in the case of Nobin Chunder and to a friend in that of Lukeekant, they bear all the marks of collusion, and in our opinion amount to no valid alienation at all and in no way interfere with the plaintiff's right to follow the property. It is therefore necessary to go further back in the transactions pleaded by defendants, and in so doing, we are met with the assertion that certain properties were purchased by Raj Chunder from his own monies, and transferred to his wife by deed of gift, in which case they cannot legally be answerable at all for the debts of Raj Chunder, either for those which he is liable as the heir of Radha Mohun, or those for which he is liable personally; and also that certain other properties were sold by Radha Mohun to his son's wife for Rs. 6,000 paid from her own *streedhun*, in which case also the property would not remain liable for Raj Chunder's debts, either those for which he might be liable as the heir of Radha Mohun, as those for which he is personally answerable. Now these assertions which, if proved, bring the property into the absolute ownership of the widows and enable them to act with it as they please, must, before they are admitted, be established by the most cogent proof. Now, looking first to the property covered by the deed of gift to Sreemuttee Dropodee Dossee, we have not the slightest satisfactory evidence that those properties were purchased by Raj Chunder's own funds. The father and son were then, it is admitted, living as a joint family. The presumption is therefore that the property was joint estate and purchased in the name of Raj Chunder, with a resulting trust in favor of the father Radha Mohun, and the burden of proving that it was separate estate rested with the defendants who have, as we have just observed, altogether failed to make out their case. As then the property is not proved to have been Raj Chunder's, we must altogether reject the *bona fides* of the alleged deed of gift by him to his wife Sreemuttee Dropodee Dossee, and her possession under it; and as we have also discredited the subsequent transfer to the defendant Lukeekant, the bar which existed to the sale of this property in execution of plaintiff's decree against Raj Chunder as the heir of Radha Mohun, is entirely removed, and we are on this ground alone, and without considering the indebtedness of the family for a series of years as

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evidenced by the decision before us, reverse this portion of the decree of the Principal Sudder Ameen, and declare the talooks Nos. 16 and 17 liable to sale in execution of their decree.

As to the objections urged by the respondent Nobin Chunder Shah to the portion of the Principal Sudder Ameen's decision adverse to him, there is no force in them at all. The fact that Sreemuttee Dossee had any *streedhun* at all is in no way proved, and the allegation of her alleged purchase and possession under that falls, and the *bonâ fides* of the transfer to the respondent being already discredited by us, no ground exists on which to interfere with the order of the Principal Sudder Ameen on this point.

We therefore decree the appeal of the plaintiff's appellants with costs of both Courts against the respondent Lukeekant, in proportion to the amount of his claim. The respondent Nobin Chunder will bear his own costs in this Court

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The 29th February 1864.

Present :

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Prescription—Limitation—Irrigation.

Case No. 379 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 14th April 1863.

Buddun Thakoor and others (Defendants) *Appellants,*

versus

Mohunt Shunker Doss and others (Plaintiffs) *Respondents.*

Mr. J. Baptist, Baboo Unnodapersad Bannerjee, and *Moonshee Ameer Ali* for Appellants.

Baboos Dwarkanath Mitter and *Romesh Chunder Mitter* for Respondents.

Suit laid at rupees 7,877-6-6.

A suit will lie to establish a prescriptive claim to irrigation from a running stream and for damages caused by the stoppage of the water by the proprietors higher up the stream erecting dams on their own lands.

Such a suit is not governed by the limitation prescribed by Clause 2 Section 1 Act XIV of 1859, but by that applicable to suits for rights appertaining to real property and for damages done to such property.

Campbell, J.—This was a suit to establish a prescriptive claim to irrigation from a running stream and for damage caused by the stoppage of the water by the defendants, proprietors, higher up the stream.

The Principal Sudder Ameen found that the disputed channel was an artificial channel excavated by the people of the different villages for their common benefit, and in making which a man of plaintiff's village named Sobree had taken so prominent a part that it bore his name to the present day. He found that the plaintiffs had long been in the habit of receiving water through this channel and applying it to their lands by means of three ducts still existing—that the defendants, contrary to established usage, had increased their ducts from three to fourteen, and to supply their 14 ducts had erected various new dams whereby the water was stopped from reaching the plaintiff's land to their loss and detriment. He found that the plaintiffs had lost the irrigation which they were in the habit of applying to about 100 beegahs of land ; and declaring and decreeing their right to the water according to the established practice, he reduced their exorbitant demand for damages to Rs. 200.

The defendants in appeal did not in argument seriously controvert the finding of the facts by the Principal Sudder Ameen made after a careful enquiry on the spot. But their Counsel attempted to argue that every man may do what he likes on his own land; that the place where they had erected the bunds and taken the water belonged to them; and that the plaintiff's action would not lie. This argument is totally opposed to the law on these subjects common to all civilized countries and with which the decision of the Principal Sudder Ameen is quite in accordance. We therefore dismiss the appeal of the defendants with costs.

We have omitted to notice that the defendants in the first place urged that the plaintiffs were barred by limitation of one year under Clause 2 Section 1 Act XIV of 1859. But we are clearly of opinion that the provision in question does not apply, since this is neither a suit for damages to personal property, nor a suit for infringement of copyright or other exclusive privilege, but a suit for rights appertaining to real property and for damages done to such property. Moreover, the plaintiffs did not unreasonably delay. They seem to have first fought the matter in the Criminal Courts, and failing there, they brought the suit within a very few months, so that they are in no way barred.

The plaintiff makes cross-objection by way of appeal under Section 348 regarding the amount of damage. But they have failed to show us that the damage suffered by them is greater than is found by the careful local investigation of the Principal Sudder Ameen, and their cross-appeal is also dismissed.

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The 1st March 1864.

Present :

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Onus probandi—Possession.

Case No. 1835 of 1863.

Special Appeal from a decision passed by Baboo Punchanun Banerjee Roy Bahadoor, Judge of the Small Cause Court, with powers of Principal Sudder Ameen, of Hooghly, dated the 2nd April 1863, *reversing a decision of the Moonsiff of that District, dated the* 10*th September* 1862.

Ishur Chunder Biswas and others (Plaintiffs) *Appellants,*

versus

Bissumbhur Biswas and others (Defendants) *Respondents.*

Baboos Opender Chunder Bose and *Banee Madhub Banerjee* for Appellants.

Baboo Bama Churn Banerjee for Respondents.

Where a defendant pleaded partly title and partly purchase, but denied that the plaintiff's father or ancestor had been in possession of any portion of the land in dispute for a very long period, and asserted his own possession on ancient titles,—HELD that the *onus* of proving possession within the period of limitation lay on the plaintiff.

Campbell, J.—WE find that the Principal Sudder Ameen has misplaced the *onus*. The defendants pleaded partly ancestral title, partly purchase, but, at any rate, they utterly denied that plaintiff's father or ancestors had been in possession of any portion of the land for a very long period, asserting their own possession on ancient titles. The *onus* of proving possession within the period of limitation lay on the plaintiff, and the Principal Sudder Ameen has nowhere found such possession, but, putting defendant to the proof of his old titles, has decreed in favor of plaintiff. This we think unjust, and we remand the case for a distinct finding of the fact whether plaintiff has proved his possession within 12 years of suit.

The 1st March 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Gifts (to Idol or Wife.)

Case No. 1783 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 24th April 1863, *reversing a decision passed by the Sudder Ameen of that District, dated the* 17*th May* 1862.

Soshikishore Bundopodhya and others (Plaintiffs) *Appellants,*

versus

Ranee Chooramoney Putto Mohadabee and others (Defendants) *Repondents.*

Baboo Tarucknath Sein for Appellants.

Baboos Kisken Succa Mookerjee and *Anund Gopal Paulit* for Respondents.

A gift to an idol or a wife, being mere volunteers, is not valid as against the donee's creditors. Land granted to an idol as debutter must be found to be ancient hereditary debutter publicly assigned as such prior to the donor's incumbency.

Campbell, J.—WE think that no such gift to an idol or wife, being mere volunteers, is valid as against the creditors of the donee; that in this view the gift of the right of shibayet to the wife is wholly invalid; and that, as regards the idol, the land cannot be held to be debutter unless it is found to be ancient hereditary debutter, publicly assigned as debutter in such a way as to be binding and effectual before Gopal Sing's title accrued, so that the assignment should be binding against him, as well as in his favour. We return the case for a finding on the issues

1. Whether the land is ancient hereditary debutter prior to Gopal Sing's incumbency, and

2. Whether, as shibayet, he has any beneficiary interest in it; since, if he denies benefit from it, those rights (after providing for the *bonâ fide* worship) can be sold.

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The 3rd March 1864.

Present:

The Hon'ble G. Loch and J. P. Norman, *Judges.*

Alluvial Lands—Julkur.

Case No. 1219 of 1863.

Special Appeal from a decision passed by Mr. J. Reily, Principal Sudder Ameen of Dinagepore, dated the 11th February 1863, *reversing a decision passed by the Sudder Ameen of that District, dated the 3rd May* 1861.

Mr. J. J. Grey and others (Plaintiffs) *Appellants,*

versus

Anund Mohun Moitro and others (Defendants) *Respondents.*

Baboos Juggodanund Mookerjee and *Baney Madhub Banerjee* for Appellants.

Baboos Kishen Kishore Ghose, Greeja Sunkur Mojoomdar, and *Unnoda Pershad Banerjee* for Respondents.

If a river merely changes its course, the old dry course of the river must be taken to have become private property; and as incident to and part of the same, the owner of the soil is entitled to all bheels or ponds, gulfs or damoores in which water remains, but which do not communicate with the river except in the time of floods, and he can claim a settlement with the Government in respect of any julkur in the same.

Norman, J.—THE plaintiffs sue for the possession of the julkur in certain damoores, alleging that they were in possession of these damoores as belonging to their estate Mouzah Chytunpore, but that the defendants, by the judgment of the Session Judge in an Act IV case, deprived them of their possession of the julkur.

The defendants pleaded by way of limitation that they, the defendants, had been in possession for fifty years; *secondly,* that the julkur did not belong to the plaintiff's estate; that the julkurs and the damoores of the Mahanuddy from Turjin above to Akoond Baria below were settled for with the former proprietors of the fishery; that they had a bheel in Mouzah Boornakhanda, and that on the south of the bheel stood the plaintiff's Mouzah Chytunpore; that the Mahanuddy carried away the bheel, but on reforming (by which probably they mean by a new change in the course of the river leaving the washed away parts dry again) five damoores were created, three of which are the subject of dispute; and that the defendants have always been in possession.

The Principal Sudder Ameen in his judgment states that "the julkurs called damoores are gulfs left in the old bed of a river. They are called koopras after the damoores have in time contracted their dimensions, and the right to them depends on the right which either party may possess in the julkur of the river." He goes on to say that "the defendants have all along been in possession of the jukur of the river, and that their exclusive right in the fishery of the river gives them a right to every receptacle of water connected with the river, whether called damoores, dohos, or moonas." He says:—"The Sudder Ameen does not consider the plaintiffs entitled to the damoores, because he alleges they are remotely situated from the river. But the distance does not appear so great as represented, and it has been sufficiently shown that the river in the rains overflows the adjacent lands and completely covers the damoores with water, so as to obliterate every indication of their existence. This is a sufficient proof of their connection with the river. It certainly gives the proprietor of the river an exclusive right to fish in the disputed localities, so long at least as they continue to retain water; and such right necessarily remains so long as the damoores may be used as fisheries. As soon as they cease to be so, defendants will naturally be prevented from exercising any further right in them."

He then disposes of the plea of title by limitation, and gives judgment against the plaintiffs, who come before us in special appeal.

The first question we have to consider is, in whom is the property in the soil of the damoores now vested? The land by which they are surrounded on every side appears to have been gained by the dereliction or alteration of the course of the river, and the plaintiff's right to the land surrounding the damoores appears not to be questioned.

In considering what are the legal principles applicable to such cases, it is convenient to refer to the Roman Law upon which the Law of England and derivatively that of this country on the subject of alluvion is founded. In the Institutes of Justinian, Book 2, Title 1, Para. 23, we find it laid down that, "if a river, leaving its natural channel, flows in another course, the former channel belongs to them who possess the farms on its banks, to each man according to the breadth of his land on the bank; and the new channel is subject to that law which governs the river, that is, it becomes public. But if, after some time, the

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river returns to its former channel, the new channel again belongs to them who have the farms on its banks." In the Digest, Book 43, Tit. 12, De Fluminibus, Section 1, Para. 7, the same rule is expressed in other words. *See* also Vattel's Law of Nations, Book 1, Chap. 22, Section 270, and the case of Isser Chunder Rai *vs.* Ramchunder Mookerjee, 1 Select Rep. 221. In the Institutes, Book 2, Tit. 1, Para. 24, it is said that, if any person's land is inundated, and the inundation does not change the form and appearance of the land, if the water recedes, the farm belongs again to the former owner.

Applying these principles to the present case, if the river simply changed its course, and there is nothing to modify the conclusion which the Court ought to draw from that simple fact, the old dry course of the river must be taken to have become private property. And as incident to and part of the same, the owner of the soil is entitled to all bheels or ponds, gulfs or damoores, in which water remains, but which do not communicate with the river except in the time of floods, and he could have claimed a settlement with the Government in respect of any julkur in the same. The right of the defendants to the fishery in the water in question being merely granted out of, and a part of, the right of the Government to the river, can no longer exist where the right of the Government itself is gone. The fact that the damoores are supplied with water by the overflowing of the river is not material. *See* Goopeenath Rai *vs.* Ramchunder Turkalunka, 1 Select Rep., 228. But if, in forming the course now left dry, the rain made its way through an ancient bheel, the julkur in which was settled, not with the owner of the surrounding soil, but with the defendants or their predecessors in estate, and the damoores in question, or any of them, can be recognized as being in fact parts or the remains of that ancient bheel, the defendants' right to the julkur in the same will be established.

The fact as to possession and exclusive enjoyment of the fishery will be material in assisting the Court to determine the question as to the right. If, for many years past, the defendants have been allowed, as if asserting and in exercise of a right and without any interruption, to come over the plaintiff's land for the purpose of fishing in the damoores and have taken fish there; or if they have taken any effectual steps to prevent the plaintiffs from fishing, it may lead to the inference that the julkurs in the damoores in question are excluded from the settlement with the plaintiffs, and either settled with the defendants, or are and have been treated as part of or appurtenant to their julkur in the river. It does not necessarily follow, as assumed by the Principal Sudder Ameen, that the right to the damoores depends on the right which either party may possess in the julkur of the river. The plaintiffs cannot make out a title by limitation or prescription, unless they can show *exclusive possession* adversely to the defendants' supposed rights.

The case must be remanded to the Lower Court for the trial of all the issues with reference to these observations.

The 4th March 1864.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Mortgage Accounts—Section 10 Regulation XV. 1793.

Case No. 607 of 1863.

Special Appeal from a decision passed by Mr. O. Toogood, Judge of Cuttack, dated the 10*th December* 1862, *modifying a decision passed by the Principal Sudder Ameen of that District, dated the* 15*th April* 1862.

Shumbhoonath Roy and others (Defendants) *Appellants,*

versus

Monowar Ali and others (Plaintiffs) *Respondents.*

Baboos Nil Madhub Sein and *Gopal Lall Mitter* for Appellants.

Baboo Anund Gopal Paulit for Respondents.

According to Section 10 Regulation XV. 1793, it is the duty of the Court to take an account of the receipts of the mortgagee in possession, and then to adjust the mortgage account of principal and interest.

Morgan, J.—This suit was brought by the plaintiff to recover a sum of money due on a bond with interest. He lent money to the defendants, which was secured by bond and also by pottah of land granted to him, it being, in fact, a mortgage security. The money was to be re-paid in 1256, and the pottah was to last until 1256. The bond contained no provision concerning interest, and the intention doubtless was (and as, in fact, the pottah explains) that the plaintiff should, in lieu of interest, realise from the

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profits of the property what he could, and that, upon payment of the principal money, he should give up the property. It is found by the Courts that the plaintiff continued in possession of the land until the year 1259, when he was dispossessed by the defendants. The Court of first instance deals with the case in this way. It allows the plaintiff whatever he received from the land up to the year 1256, and also his receipts from the land from 1256 to 1259, when he alleges he was dispossessed; it applies the money received during the latter period (1256 to 1259) first to satisfy interest on the principal sum at the rate of 12 per cent., and the remainder it applies in reduction of the principal; and for what ultimately is found due, the Court gives the plaintiff a decree.

The Lower Appellate Court reverses that decree, and gives the plaintiff a decree for Rs. 1,200 principal, and also for Rs. 1,200 interest. The Lower Appellate Court observes that, by the bond, no provision was made for the payment of interest; that the intention of the parties doubtless was that the plaintiff, by receiving the profits of the property, should in effect receive what was equivalent to interest; and that the plaintiff, having been dispossessed of the property by the defendants in 1259, by such dispossession acquired, from the nature of the transaction, a right to receive interest in place of the profits which he had received hitherto. The result is that the decree of the Court gives him Rs. 1,200 principal, and Rs. 1,200 interest.

In our opinion, both the Lower Courts have proceeded in their decrees erroneously. The law which guides them in such matters is Section 10 of Regulation XV of 1793. It was their duty in such a case to take an account of the receipts of the mortgagee from this property, and to adjust the mortgage account of principal and interest after ascertaining what was received by the mortgagee in possession.

The case must be remanded in order that an account may be taken of the plaintiff's receipts from the property during the time that he was in possession. If he were really dispossessed, the state of the account at the date of his dispossession must be ascertained. If any balance was then and still remains due to the plaintiff in respect of the mortgage money, that balance will be secured to him with such rate of interest as the Court may consider the law enables it to decree. The case will, therefore, be remanded to the Court of first instance to have the account taken with reference to the Regulation referred to, which seems to have been entirely overlooked by both Courts.

The 5th March 1864.

Present:

The Hon'ble C. Steer and W. S. Seton-Karr, *Judges.*

Res judicata—Sale—Mortgage.

Case No. 1382 of 1863.

Special Appeal from a decision passed by Mr. A. E. Russell, Judge of Moorshedabad, dated the 12th March 1863, affirming a decision passed by the Moonsiff of that District, dated the 31st December 1862.

Ramkisto Shaha (Plaintiff) *Appellant,*

versus

Nemy Churn Cholhai (Defendant) *Respondent.*

Baboos Tarucknath Sein and *Romanath Bose for* Appellant.

Baboos Onookool Chunder Mookerjee and *Oprokash Chunder Mookerjee* for Respondent.

A former suit for the property in dispute having been unsuccessfully brought on the allegation that the deed on which the plaintiff claimed was a deed of sale, he now called it a mortgage and sued for his rights under it. HELD that the subject matter of the two suits was quite different, and that the present suit would lie, notwithstanding that the former suit was dismissed without permission to the plaintiff to bring a new suit.

Steer, J.—THE plaintiff brought a former suit against the present defendant in which he sought to establish that Gunga Narain had sold to him, by an out-and-out deed of sale, the property in this suit. Before the suit was ripe for a decision, he asked permission to withdraw the suit. The Judge refused it, and declared his suit dismissed.

He now sues on the allegation that the above said Gunga Narain had given him a mortgage of the property, which mortgage he had foreclosed, and now sued to obtain possession.

These two suits the Judge regards to be identical in their object; and, inasmuch as the first suit was dismissed without permission to bring a new suit, he rules that the plaintiff's suit cannot be entertained.

We think the Judge is quite wrong. In the first suit, the plaintiff took upon himself to prove that his deed was a deed of out-and-

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out sale. The effect of the Judges's decision is that it was not an out-and-out sale; and, had the present suit been brought on the same ground that it was an out-and-out sale, it could not be entertained. But, as stated above, the plaintiff in the present suit abandons the ground that the deed is an out-and-out sale; he calls it a mortgage, and sues for his rights under it. The subject matter of the two suits is, therefore, quite different; and whether the judge in the former suit did or did not permit the plaintiff to bring a fresh suit, is a matter of no consequence whatever. He cannot bring a second suit for the same matter without permision; but where the matter or the cause of action is not the same, no order of the Judge can deprive him of his right to have such new cause of action tried and adjudicated. On these grounds, we reverse the decision of the Judge, and remand the case to be tried on its merits.

The 7th March 1864.

Present:

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

Joint Hindoo Family—Presumption —Onus probandi (Separate Estate.)

Case No. 354 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 18th April 1863.

Maharajah Rajender Pertab Saha (Plaintiff) *Appellant,*

versus

Maharaj Coomar Baboo Beer Pertab Saha and others (Defendants) *Respondents.*

Messrs. G. C. Paul and *J. Baptist, Moonshee Ameer Ali*, and *Baboos Kishen Kishore Ghose* and *Unnodapersad Banerjee* for Appellant.

Mr. R. T. Allan, Baboos Sreenath Doss, Onookool Chunder Mookerjee, and *Debendernarain Bose*, and *Moulvie Murhumut Hossein* for Respondents.

Suit laid at rupees 49,626.

In the case of an ordinary joint undivided family, the presumption of Hindoo Law would be that the whole property is joint estate, and the burden of proof would be on the party claiming any property as his separate estate to establish the fact. But where a plaintiff, though admitting that the family is undivided, contends that the family estate is a Raj, and has always been held by him separate and distinct from the others who are only entitled to maintenance, the undivided nature of the family alone on this contention can raise no presumption as to the joint nature of the estate so as to shift the burden of proof from the plaintiff to the defendant, a presumption inconsistent with the contention itself; but if, under such circumstances, the head of the family alleges that he has made purchases in the name of a single member, and that allegation is traversed, the *onus* will be on the party making the allegation to prove his case.

Trevor, J.—PLAINTIFF Maharajah Rajender Pertab Saha sues Baboo Beerpertab Saha and others for a declaration of his title to, and for possession of, the villages of Muhwal, &c., in Zillah Sarun, with mesne profits.

Plaintiff alleges that Maharajah Chutterdaree Saha Bahadoor, his paternal great-grand-father, was the owner of the Raj Hoonshapoor, and that he, having bought the property claimed, in the ostensible name of one of his grandsons, the defendant Beerpertab, enjoyed possession of the same until his death on 16th March 1858; that previous to his death he, by will, bequeathed the Raj and all his moveable and immoveable properties including cash and goods, too, and conferred the Raj talook on plaintiff, his great grandson through his eldest male issue; that he, according to the family usage and the delivery made to him, entered upon possession of the property attached to the Raj, and obtained from the Court a certificate under Act XX of 1841; that, in consequence of objections raised by the defendants, the Deputy Collector on 14th June 1853 refused to enter his name in the Collectorate as the owner of the properties now claimed, insasmuch as they were never in the Maharajah's name but in that of Beerpertab, and the order was confirmed by the Collector on the 5th August 1858, and by the Commissioner on the 8th October of the same year; that by this proceeding, he (plaintiff) was dispossessed, and defendands obtained possession. He therefore brings the present suit for possession with mesne profits of these properties which were purchased by the Maharajah in the name of Beerpertab.

The defendant Beerpertab in his written statement avers that the properties now claimed by the plaintiff were purchased by him and his brother Teluckdaree Saha from the proceeds of the property they inherited from their maternal grand-father, either by private sales, or at public sales in execution of decrees, and that they have been in the enjoyment of them from the date of purchase to the present time; that plaintiff's allegation of his own possession and of Rajah Chutterdaree Saha is false; and therefore on this ground the claim should be dismissed under the Statute of Limitation.

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The defendant Narendropertab answers to the same effect.

The Principal Sudder Ameen, taking up first the plea of limitation, was of opinion that plaintiff had not shown to his satisfaction either that the Maharajah before him, or that he himself after his death, had ever been in possession of the properties sued for. He therefore dismissed plaintiff's suit with costs.

From this decision an appeal has now been preferred by the plaintiff below, and it is urged by the learned Counsel Mr. Paul on his behalf that the Principal Sudder Ameen, in a case like the present, was altogether wrong in looking simply to possession; that the only question in this case is whether the purchase of the properties claimed by plaintiff was made by the Rajah in the defendant's name, whereby a trust resulted to the Rajah, or whether defendant purchased them with his own monies; that as all the papers are admittedly in the name of the defendant, they alone can prove nothing conclusive as to the real possession of the parties, until the source whence the monies came by which the properties claimed were purchased is enquired into, but that, when this point is elucidated, it will explain and clear up the facts connected with possession; that the parol evidence offered by the plaintiff to prove the source whence the monies came, *viz.* the coffers of the Rajah's ancestor, supplemented as it is by the documentary evidence, showing the neediness of the defendant about the time of the alleged purchase by him, and the consequent impossibility of his being the purchaser considered alone, is sufficient to entitle the plaintiff to a verdict; that again the oral evidence of the plaintiff contrasted favorably with that offered by the defendant, for, referring as it does to events that occurred many years previously, it is given with less of suspicious particularity than is that of defendant's witnesses; that again the mass of receipts for the payment of revenue clearly show that the possession has all along been with the plaintiff's ancestor and himself, until dispossessed by the act of the Revenue authorities complained of. It was, lastly, contended by Mr. Paul that, if the Court were not satisfied with the evidence on the record as to the plaintiff's claim, it should, in the interests of justice, postpone the case, and summon the defendant Teluckdaree and other witnesses whose evidence is material of the case.

On the part of the defendant, it was urged by Mr. Allan that, on the pleadings in this case, the burden of proof was on the plaintiff, and he had altogether failed to prove his case; that possession and the title deeds were both with his client, and that to oppose these there was only the parole evidence of a few witnesses in a low class of life; that this evidence was contradicted by that of respectable persons, not only witnesses to the deeds, but vendors to the defendant of some of the properties sold, persons who could have no reason for committing perjury; that, again, from the evidence it was clearly proved that the defendant Beerpertab was, subsequent to the date of his coming of age, in joint possession of the properties in suit with his brother Teluckdaree Saha, and that thus plaintiff's claim, which was in itself supported by no trustworthy evidence, is entirely met and refuted.

We think that the objection of the learned Counsel for the plaintiff, appellant, to the proceedings of the Principal Sudder Ameen, who, in a case like the present, has looked only to the evidence as to possession, is well founded. This evidence as to possession consists, for the most part, of papers made out in the name of the defendant; and on the plaintiff's allegations such would necessarily be the case, for, defendant having the legal title, his name would everywhere appear; but such appearance could not prove that the beneficial ownership was with him also. That point, which is the contention in the present case, can only be satisfactorily settled by looking to the source whence the purchase-money for the property came; and, after that point is settled, the papers produced can, by the light thrown upon them, be then and then only satisfactorily interpreted. We must, consequently, look into the whole case of the plaintiff; and, as the evidence to prove plaintiff's title is on the record, no necessity exists for the remand of the case.

Before, however, entering upon the determination of the particular case before us, it will be well to state certain circumstances connected with the family which have been brought to our notice during the hearing of this case.

The family to which the litigants before us belong is a very ancient one, and was a Raj or Principality during the period of the termination of the Mahomedan rule in Behar. On the accession of the East India Company to the Dewanee, the then occupant of the Raj, Rajah Futteh Saha, refused to acknowledge allegiance to the Government. He

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rebelled and was driven into Oudh, and Government took possession of his Raj, which it retained until 1790, when possession of it was restored to Chutterdaree Saha, the great grand-father of the plaintiff before us, who remained in undisturbed possession till his death in March 1858. Early in 1859, the defendants before us instituted a suit against the present plaintiff, who was then in possession of the Raj as descendant of Chutterdaree Saha through his eldest son Ram Sahee Saha, to establish their rights to a moiety of the entire moveable and immoveable property left by the Maharajah Chutterdaree, and to cancel a will set up by the plaintiff in this case. This suit has been recently, that is, on the 23rd April 1863, decided by this Court, and this much we may observe that the claim of the plaintiff was dismissed, the property being determined to be a Raj, and they, defendants, as the uncles of the plaintiff, and as the guardians of Maharajah Chutterdaree through his younger son Pertipal Saha, being declared entitled simply to maintenance. Whilst that suit was pending in appeal before this Court, *viz.*, on 11th September 1862, the present action was brought by the Maharajah. The cause of action, according to his own statements, occurred in October 1858. During the following four years, though dispossessed of his property, no complaint was made anywhere; but three years after the institution of the first suit by the defendant for a moiety of the Raj, the present action is brought for the recovery of property of which by an act of the Collector, the Maharajah had been dispossessed.

Laying aside all consideration of the judgment in the case recently decided by the Court, and looking merely to the allegations of the plaintiff in this suit and in his defence in the other, a copy of which is on the record, we are clearly of opinion that no presumption arises so as to shift the burden of proof from plaintiff to the defendant. Had the family been an ordinary *joint* undivided one, the presumption of Hindoo Law would be that the whole property of the family is joint estate; and had this fact been admitted by defendant, or, if alleged by plaintiff, and denied by defendant, been proved to be the real estate of things, then the burden of proof would be on the party claiming any property as his separate estate to establish the fact. But in this case the plaintiff, though admitting that the family is undivided, contends that the family estate has always been held by him separate and distinct from the others who are only entitled to maintenance. The undivided nature of the family alone on this contention raises and can raise no presumption as to the joint nature of the estate—a presumption which would be inconsistent with the contention itself; but if, under circumstances similar to those disclosed in this suit as to the family property, the head of it alleges he has made purchases in the name of a member of the family, and that allegation is traversed, it will rest upon the party making the allegation to prove his case.

Such being the mode in which we regard this case, we proceed to look at the plaintiff's case. The original deeds of conveyance of the property in suit, though not all filed at the same time, are on the record, and have been filed by the defendant in the suit, with whom also is possession of the properties. No suggestion has been made by the plaintiff as to the particular mode in which those instruments passed from his own and Chutterdaree Saha's custody into the hands of the defendant. The simple fact, therefore, above stated, remains unaccounted for.

Looking, then, to the deeds filed, we find that they consist, 1*st*, of the bynamahs of the Collector, dated 21st July and 12th August 1826, of the rights and interests of Baboo Nund Narain in Jugheera, and also in Gorapalli Ramapalli and Gaichpore, both purchased in the name of Beerpertab for a consideration of 300 and 190 rupees respectively on the 28th January 1845, at a sale in execution of a decree; 2*nd*, a deed of sale from Lalljee Saha to Beerpertab Saha of his rights and interests in Ramapalli Gorapalli and Gaichpore for a consideration of rupees 2,200, and dated 22nd May 1846; 3*rd*, a deed of sale by Dhirga Roy to Beerpertab Saha, dated 28th January 1848, of his rights and interests in the villages of Baturdah and others for a consideration of 12,000 rupees; and 4*th*, a deed of sale from Dhirga Roy to Beerpertab Saha, dated 7th March 1848, of Puharpoor and other villages mentioned therein, for a sum of 11,500 rupees.

The direct evidence to prove that the purchase at the two sales in execution took place on the 28th January 1845 was made by Chutterdaree Saha, is the depositions of Kallychurn Roy mooktear, Bhugwan Dutt, and Motee peadah. They were all servants of the Rajah, and in 1863 depose to what occurred in 1845, fifteen years before, with minute particularity. But it is not this particularity alone that renders their evidence untrustworthy; it is the fact that they, having no particular cause for remembering

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that to which they depose so minutely, should nevertheless be able to recollect all the circumstances connected with a transaction to them indifferent. They state in their evidence that the purchase was made by Soonder Narain and Hurbuns Lall as the mooktears of the Rajah in the name of Beerpertab, and this appears from the bynamah itself. To corroborate their statement, a general power of attorney from the Maharajah in the names of Hurbuns Lall and Mohun Lall, dated 1837, is filed. Now it is clear that a mootearnamhah to *A* and *B* in 1837 is no authority for *B* and *C* to perform an act in 1845; but, independently of this fact, on referring to the power of attorney itself, we find that it is not a general power, but specifies the particular matters in which the parties are to act—matters connected with pending and future resumption and settlement cases; but it gives no authority to the parties named in it to purchase property in the Rajah's name, which may be sold in execution of decree. The oral and documentary evidence produced, therfore, to show whence the money came by which the property sold in excution was purchased is in itself very insufficient, and becomes more so when we have placed before us, by defendant's pleader, a power of attorney executed by Beerpertab himself to Hurbuns Lall and Soonder Narain to purchase these properties, dated 22nd January 1845, and find every thing properly and formally by them done under the power.

Turning, then, to the deed of sale from Lalljee Saha executed on the 22nd May 1846, we find that the subscribing witnesses are all dead, with the exception of Dengoo Roy and Rampertab Singh. These witnesses depose that the writer of the deed was Ramsurrun Lall; that the mooktears on the part of the Rajah who arranged matters were Ajoodeapersad and Mohun Lall, and they detail minutely, though perfectly unconcerned with the sale, all the proceedings connected with the payment of the purchase-money. Mohun Lall, it appears, is dead, and Ajoodeapersad, in whose name a mooktearnamah dated 20th July 1864 was executed by the Rajah Chutterdaree in supercession, it would seem, of a previous one in the name of other parties, is represented by the appellant's Counsel to have been gained over by the opposite side, and he, therefore, has not been called by him. Be that as it may, the statement of these two witnesses uncorroborated is totally insufficient to prove the plaintiff appellant's case as to the transaction to which they bear testimony.

The witnesses to the 3rd and 4th deeds are all dead, with the exception of Bhugwunt Lall, the writer of the deed, and Tulwunt Singh, whose evidence has been given in favor of the appellant. The remarks which we have made to the witnesses to the former deeds apply to these. They prove all but the source when the money came; but the person, who, according to their statement, would from his position have been able to give the Court trustworthy evidence in the case, *viz.*, Ajoodeapersad, the mooktear, has not been examined; in his absence, and in a case like the present, we are totally unable to rely on such unsupported testimony.

In addition to this evidence, there is the evidence of a Putwari, *viz*: Balmokund Doss, who deposes that the villages of Muhwal, Puharpore, &c., of which he is the Putwari, and other villages, were purchased by the Rajah, and were in his possession as long as he lived, and that, shortly after his death, the present Rajah was dispossessed of them. Dakhilas also for revenue paid in by Ajoodeapersad, Hurbuns, Soonder Narain, and Mohun Lall on account of these properties from 1253 to 1260, amounting to 12,634 are filed, but the payment of revenue by parties untill the *exclusive agency* of those parties for the Rajah is clearly established, is of little weight in enabling us to determine a point like that before us; and, as the evidence does not, to our satisfaction, establish the possession of the Rajah at any time, it is unnecessary for us to state what effect proof of that point might have had in throwing the burthen of proving his title on the defendant in this case.

It is urged, however, by Mr. Paul on the part of the appellant that, even if the direct evidence of his client as to the source whence the purchase-money for the property in suit came is insufficient of itself, still, when supplemented by certain facts, showing the impossibility of Beerpertab having any money from 1845 to 1848, within which time the purchases were made, it becomes strong and quite sufficient to support successfully the plaintiff's claim. Those facts are, that, on the 11th June 1825, when Beerpertab's brother Teluckdaree was a minor, and Beerpertab not born, their maternal grand-father Jeeta Saha, by an instrument in the nature of a testamentary disposition of his property, left it to Teluckdaree and his heirs; that suits were unsuccessfully instituted by the brother of the maternal grand-father to set aside the tumleeknamah, and also by the grand-mother of the minor Teluckdaree, with the

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same purpose, making Teluckdaree alone defendant; and that though Beerpertab was born in 1826, and, therefore, attained his majority in 1844, and those suits were decided severally in 1839 and 1843, no mention of him was made in them at all; that, in short, Beerpertab is not mentioned in connection with the maternal grand-father's property until 1862 in which year he sued Teluckdaree for half of the properties left to Teluckdaree by the maternal grand-father, of which he had been dispossessed by him; that in that suit Teluckdaree denied Beerpertab's rights, but stated that he had transferred his interest to his son Narendropertab, a co-defendant in the present case; that, on the 26th February 1863, the parties to that suit compromised the case on the terms that both parties should hold the property jointly, and that, after Beerpertab's death, it should descend to Narendropertab; that, on the 24th February 1862, the latter had compromised the great case with the Rajah. Thus, remarks the learned Counsel, having got as much as he could from the Rajah, he now sues to get these villages on the allegation that they partly belong to Beerpertab.

Though the evidence of the plaintiff, both documentary and oral, was weak, still a perusal of the documents cited by the learned Counsel to show the impossibility of the purchase being made by Beerpertab, strengthened it to such a degree that we considered it necessary to call upon the defendant to open his case.

The testamentary disposition by the maternal grand-father was admitted, but it was urged, and to our minds with reason, that this instrument was never intended to disinherit any party who, subsequently to its execution, might be born to the same family rights as Teluckdaree; and it was a matter of fact, proved to our satisfaction, that the brothers, notwithstanding, had always been in joint possession of the properties left to the maternal grand-father, and that the properties in suit had been purchased by the proceeds of the properties in the name of Beerpertab. Moreover the particular cause out of which the suit of 1862 between the brothers arose, may be inferred from an attention to certain dates. Whilst the great cause between the defendant and the plaintiff in this case was pending in appeal, the brother of Beerpertab having first, on the 22nd February 1862, transferred all his rights to his son Narendropertab, that person, two days after, *viz.*, the 24th February, compromised the suit with the Rajah. The result of the compromise was that the uncle Beerpertab and his nephew Narendo, then under influence of the Rajah, became hostile to each other; and it would seem that an attempt was made under the same influence to oust him from his rights —an attempt which was rendered futile by the compromise in the case which was instituted by Beerpertab in September 1862.

This view of the facts altogether rebuts any presumption as to the indigence of the defendant Beerpertab, and leaves the plaintiff's weak evidence altogether unsupported. It would, therefore, be sufficient at once to dispose of the plaintiff's case; but, as we have heard the depositions of Lalljee Saha, the vendor of the property covered by the deed of sale dated 22nd May 1846, and of Ramdyal Rout, the defendant's treasurer, and Seochurn, as to the circumstances connected with that transfer; as, moreover, we have heard the evidence of Lukhinarain, the son of Dirjoo Roy, the vendor of the properties covered by the deeds dated 28th January 1848 and 7th March 1848, as to those transactions, omitting notice of all other witnesses for the defendant, we have no hesitation in coming to the conclusion, not only that the plaintiff appellant has not proved his case, but that the defendants have established theirs. The evidence of these men is marked by particularity, but it is not open to suspicion, inasmuch as its particularity arises out of the part which the deponents bore in the transaction to which they depose, and does not rest simply on the ground of a retentive memory.

The learned Counsel for the plaintiff appellant has pressed upon the Court that, if it think that the record as it at present stands is unsatisfactory, justice requires that that state of things should be remedied by sending for the different parties, whose evidence might clear up and explain everything; that with this object Teluckdaree, Ajoodeapersad, and Hurbuns Lall might be summoned, and any documents that might be necessary called for by the Court.

There are no doubt cases in which the Court will summon witnesses who, it thinks it essential for the ends of justice, should be examined, and call for documents in the hands of particular parties; but the Court will not assist a plaintiff by such a course of proceeding unless the plaintiff has assisted himself to the utmost extent in his power. Now, considering the evidence which, on the supposition that plaintiff's case is a true one, he might have produced, but has not attempted to produce, the Court does not think this a case

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in which the interests of justice will be served by any action on its part. It rather is of opinion that any action on its part would only assist plaintiff in further harassing parties whom, from circumstances arising out of family feuds, he has chosen without reasonable or probable cause to bring into Court.

The appeal of the plaintiff is dismissed, and the judgment of the Lower Court affirmed with costs and interest at 12 per cent.

The 8th March 1864.

Present :

The Hon'ble C. Steer and W. S. Seton-Karr, *Judges.*

Meeras Pottah (by temporary lessee) —Jurisdiction—Right of occupancy.

Case No. 396 of 1863.

Special Appeal from a decision passed by Mr. R. Abercrombie, Judge of Dacca, dated the 9th December 1862, *affirming a decision passed by the Principal Sudder Ameen of that District, dated the 26th November* 1861.

Chundee Chunder Mitter (Plaintiff) *Appellant,*

versus

Mr. J. Beckwith and others (Defendants) *Respondents.*

Baboos Onookool Chunder Mookerjee and *Juggodanund Mookerjee* for Appellant.

Baboos Greesh Chunder Ghose and *Dwarkanath Mitter* for Respondents.

A meeras pottah, granted by a person holding only a temporary lease, is not valid against the right of the zemindar to take possession of the land on the expiration of the grantor's lease.

Whether the grantee has any other right derived from a 12 year's occupancy of the land, is not a matter cognizable by the Civil Court.

Steer, J.—The plaintiff sues the defendants for possession. He avers that the lands were let to one Takoor Doss for a lease of years ; that, on the expiration of the lease, the plaintiff took possession, but he was again dispossessed by the defendant Mr. Beckwith, who sets up a meeras jote pottah from Takoor Doss.

Takoor Doss's heirs were made defendants, but they put in no answer ; and, having been brought into Court to give evidence in the cause, they admitted that the nature of their holding was, as the plaintiff describes it, a temporary lease or farm, the term of which having expired, the plaintiff had taken possession, and they had nothing more to do with the lands from that date.

The Judge held the meeras jote pottah of Mr. Beckwith to be proved, and he presumes that Takoor Doss held a meeras pottah from the plaintiff, because the plaintiff would not have allowed him without opposition to give Beckwith a meeras jote, unless he, Takoor Doss, actually had the power to give a meeras jote pottah.

We think there can be no doubt, nor, indeed, in special appeal can we question the fact that Takoor Doss did give Mr. Beckwith's predecessor in the Meergunge concern, the meeras jote pottah upon which Mr. Beckwith and his predecessor have held the land for 22 years. But this fact is of comparative small consequence to the decision of the case. The important question is what right Takoor Doss had to give a meeras jote pottah.

Now Takoor Doss's heirs make no defence; they not only make no claim to hold the land, but they allow that they never had any other right to it than as holders of a temporary lease, the full term of which has expired. Thus between the plaintiff, the zemindar, and Takoor Doss's heirs, his immediate tenants, there is no contention whatever ; and so far as they are concerned, the plaintiff is clearly entitled to a decree. It is no doubt competent to Beckwith to say that Takoor Doss did hold, not a temporary lease, but a permanent tenure ; but he is bound, where Takoor Doss's heirs allow that the nature of their tenure was a lease for a term of years, to prove that the tenure was in fact a meeras. This Mr. Beckwith has not been able to do, and he has, therefore, no right to resist the possession of the zemindar under any title derived from Takoor Doss, whose heirs do not even pretend to have any title themselves.

Mr. Beckwith's pleader was very earnest in pressing Mr. Beckwith's right to hold the land as a tenant having a prescriptive right to it ; but the case before us is a simple Civil suit, and does not admit of such a question as that which the pleader wishes to raise. In this suit Mr. Beckwith has stood on Takoor Doss's right to give him the meeras jote pottah, and he must stand or fall by that. Had he proved the right, he might have been entitled, whatever Takoor Doss' heirs might say, to be maintained in possession ; but, having failed to prove the right, he cannot shift his ground and say, I am a tenant of

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more than 12 years, and therefore I have a right to occupy the land, be my title as derived from Takoor Doss good or bad. Sitting as a Civil Court, we could not entertain such a question, which is one over which the Revenue, and not the Civil Court, has exclusive jurisdiction. Nor can we allow such a plea to be raised, when the nature of the answer of the defendant, and the way his case was laid before the Lower Courts, do not in any way show that the defendant rested or relied upon his right as a tenant who had acquired a prescriptive right of occupancy.

Confining ourselves to the issues actually raised, we hold that, where Takoor Doss's heirs admit the right of the zemindar and allow that their tenure was a temporary one, and that the plaintiff got possession on the expiration of the lease, the plaintiff, as against the heirs of Takoor Doss, has nothing to prove and is entitled to a decree against them on their admission. We hold that the failure or the purposed omission of the heirs of Takoor Doss to prove their title as permanent lease-holders would not deprive Mr. Beckwith of his right to hold the lands if he could show that Takoor Doss' title was that of a meeras holder, but he is bound, under the circumstances, to prove this, and he has not done so. We accordingly declare that he has no right under any title derived from Takoor Doss to keep the zemindar out of possession; and whether he has any other right derived from a twelve years' occupancy of the land, is not a point for our consideration, nor will this judgment prejudice such right in any way.

We accordingly decree to the special appellant the possession of the right sued for, *viz.* the right to dispossess Takoor Doss's heirs and Mr. Beckwith as holding under them on his meeras jote pottah. As Takoor Doss cannot escape from the charge of fraud, looking at his conduct from any point of view, it is right he should be burdened with the payment of the costs of this action. If he had a meeras tenure, he has colluded with the plaintiff and defrauded Beckwith; and, if he had no meeras tenure, he should not have deceived Beckwith, and given him a tenure in perpetuity, knowing he had no power to make such a tenure in his favor. The costs, then, from first to last will be upon Takoor Doss's heirs; and in respect to the mesne profits, we disallow it altogether for any period prior to the institution of the suit, from which date Mr. Beckwith will be liable, and the costs against Takoor Doss' heirs will be reduced in proportion.

The 8th March 1864.

Present:

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Pre-emption—Performance of preliminaries—Limitation—Possession.

Case No. 351 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 21st April 1863.

Mussamut Hosseinee Khanum (Defendant) *Appellant,*

versus

Mussamut Lallun (Plaintiff) *Respondent.*

Mr. R. T. Allan and *Moulvie Murhumut Hossein* for Appellant.

Mr. C. Gregory and *Moonshee Ameer Ally* for Respondent.

In a suit for pre-emption, proof of performance of the preliminaries prescribed by the Mahomedan Law is essential.

In pleading limitation as a bar to such a suit, the defendant must show that he was in possession more than a year before the plaint was filed.

Jackson, J.—In this case the plaintiff claimed as *shufia-i-khulit* the right of pre-emption as to fractional shares in certain mouzahs, whereof the plaintiff was part owner.

Defendant pleaded that, under the sale impeached, only the enjoyment of annual profit, and not actual possession of the land had passed, and that consequently pre-emption did not apply; next, that the claim was advanced too late, also that the requisite preliminaries had not been observed. It was also expressly averred that a tender of the property sold had been made to the plaintiff and had been refused.

This averment relieved the plaintiff of the necessity of proving her right of pre-emption, and also, we think, disposed of the plea that pre-emption was not applicable to the case.

It remained, therefore, to be decided whether plaintiff had effectually asserted her rights in the form prescribed by Mahomedan Law, and whether the suit was brought in time.

The Principal Sudder Ameen gave a decree for the plaintiff, against which the present appeal is brought.

The Law of Limitation at present governing suits of this kind is Section 1 Act XIV of 1859, of which the first Clause provides as to suits to enforce rights of pre-emption that they shall be brought within one year to be

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computed from the time at which the purchaser shall have taken possession under the sale impeached.

The time of taking possession is in this case disputed, and evidence on both sides has been produced; but, as the possession was not immediate, it is not very easy to determine when it commenced.

We think, however, that defendant has not shown that she entered in possession more than a year before the plaint was filed so as to bar the suit.

On the main question as to whether or not the prescribed forms had been complied with, the Principal Sudder Ameen says in his judgment, "the evidence of plaintiff's witnesses satisfactorily proved the fulfilment of the preliminary conditions of pre-emption."

On this point we find ourselves wholly unable to agree in the opinion of the Court below.

When a plaintiff sues on the ground of a right such as that of pre-emption, vexatious even when most fairly exercised, and always restrictive of the rights of property, we think the Court should be fully satisfied that he has really and exactly performed the conditions essential to the maintenance of that right.

We must look upon these preliminaries, not as mere matters of form, but as the immediate expressions of (perhaps) a pre-existent desire to become owner of the particular property, arising out of those circumstances of necessity or convenience, which the Mahomedan Law recognizes as giving birth to the right.

It is not, therefore, as it seems to us merely for form's sake, but as intimately connected with the question of right that we require proof of the *tulub-i-mowasibut* and of the *istishad*.

Now the testimony of the witnesses on this point struck us when it was read as unmistakeably tutored evidence, the story of men instructed to meet exactly certain forms, so dramatically told, and with such uniformity of expression and phrase, as to create the strongest distrust in our minds. And while a clear declaration of a contrary opinion by the Judge who heard the witnesses would have gone far to counteract this impression on our minds, on the other hand the absence of all remark, the brevity with which he dismisses that part of the question, leads us to the belief that the Principal Sudder Ameen regarded the preliminary forms as forms and nothing more, requiring proof only for form's sake. We have said that we consider these forms to be really matters of importance. We are by no means satisfied that they were really observed, and the delay in bringing the suit until it became questionable whether the plaintiff was in time or no, renders her non-observance of the forms all the more probable.

We consequently are obliged to reverse the decree below, and to decree this appeal with costs in both Courts.

The 8th March 1864.

Present:

The Hon'ble H. T. Raikes and W. S. Seton-Karr, *Judges.*

Sureties.

Cases Nos. 347, 377, 355, and 356 of 1863.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Mymensingh, dated the 21st April 1863.

Case No. 347 of 1863.

Sadut Ali Khan and another (Defendants) *Appellants,*

versus

Manikarnika Chowdhrain (Plaintiff) *Respondent.*

Baboos Dwarkanath Mitter and *Hem Chunder Mitter* for Appellants.

Baboo Onookool Chunder Mookerjee for Respondent.

Case No. 377 of 1863.

Kudrat Ali Khan Chowdry and others (Defendants) *Appellants,*

versus

Manikarnika Chowdhrain (Plaintiff) *Respondent.*

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Appellants.

Baboo Kally Mohun Doss for Respondent.

Case No. 355 of 1863.

Ram Coomar Chowdhry (Defendant) *Appellant,*

versus

Manikarnika Chowdhrain and others (Plaintiffs) *Respondents.*

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Baboos Dwarkanath Mitter and *Sreenath Doss* for Appellant.

Baboo Kishen Dyal Roy for Respondents.

Case No. 356 of 1863.

Nund Mohun Chowdry (one of the Defendants) *Appellant,*

versus

Manikarnika Chowdhrain (Plaintiff) *Respondent.*

Baboos Dwarkanath Mitter and *Sreenath Doss* for Appellant.

Baboo Greeja Sunkur Moozoomdar for Respondent.

Plaintiffs became sureties for a Collectorate Treasurer, and bound themselves to make good any loss or deficiencies which might occur in the Treasury from whatever cause. A deficit having been discovered in the deposit accounts of certain Zemindars, the Collector carried to account the amount then in deposit and attached the property of the sureties for the balance of the deficit. Plaintiffs now sue the Collector, the Zemindars, and the Treasurer for a refund of the money so levied from them. HELD that only the Treasurer, but not the Collector or the Zemindars were liable.

Seton-Karr, J.—THE litigation out of which these appeals arise is detailed at pages 906 and following of the decisions of the late Sudder Court for 1857. Two brothers, Nundokumar and Nobokumar, became sureties for the Treasurer of the Mymensingh Collectorate, and bound themselves to make good any losses or deficiencies which might occur in the Treasury from any cause whatever. A defalcation of 40,508 rupees was eventually found in the deposit accounts of the persons whose representatives have been made defendants in the present action. The zemindars, it appeared, had been allowed to overdraw their accounts by warrants granted by the Collector on the Treasurer's report. The Collector, on discovering the deficiency in the deposit accounts of the estates, which were then under the Court of Wards, carried to account 17,596 rupees which were then found in deposit, and attached the property of the sureties for the recovery of the balance of the deficit, or 23,234 rupees. This being done, the representatives of the sureties sued the Collector, the Treasurer, and the zemindars who had overdrawn their accounts, for a refund of the monies, and the upshot of the litigation, after the case had been once remanded, was that the late Sudder Court, on the 30th of May 1857, exempted the Collector from liability, and non-suited the plaintiff as against the zemindars on the ground of misjoinder, and also because these latter had a right to know more distinctly the value of the different claims brought against them.

The result of the above ruling is that the plaintiffs, that is to say, the wife of Nundokumar, and Kristokumar, his adopted son, and the son of Nobokumar, have instituted eight suits against the zemindars or their representatives and against the Treasurer. Four of these suits are below 5,000 rupees, and have been appealed to the Judge. The appeals in the other four cases have been brought before us by the defendants, who have each been held liable and have been cast by the Lower Court in the amount of their respective portions of the sums overdrawn with interest.

The cases have all been argued before us on one and the same ground, *viz.* the nonliability of the zemindars to re-imburse the sureties of the Treasurer. This latter person, who has also been cast, has not appealed. Having heard the pleaders in support of the appeal, and the respondents in support of the decree gained by them, we are of opinion that the actions to make the zemindars responsible will not lie, and that the appellants are entitled to be relieved from the claims against them.

We observe that, although the plaintiffs allege collusion between the Treasurer and the zemindars, there is no evidence to any such fraudulent dealing between them. We are asked to infer fraud, simply because the accounts were permitted to be overdrawn under a laxity of practice admitted to exist by the late Sudder Court in their decision of 1859; and the Lower Court, while in one part of its decision it talks of the collusion of the land-holders with the Treasurer, in another expressly says that there is no proof that the zemindars knew that they were overdrawing their account. We admit that, had there been decisive proof of fraudulent dealings between these parties, we might, as a Court of Equity, give the plaintiff relief against them all. But, when there is no such proof, we can only look to the actual legal liability.

Now it is argued that, irrespective of any question of fraud or collusion, the Treasurer might have recovered from the persons overdrawing their accounts; that the plaintiffs, under pressure, have made good the deficit; that they stand in the exact position of the Treasurer and of the Collector; and having brought all parties into Court, that they are entitled to relief against them all. We are also referred to Theobald on Sureties, page 252, where it is ruled that in equity a surety is entitled to every remedy which the creditor has against the principal debtor. But, not to say that none of the cases there

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quoted are exactly in point with the present case, it can never be contended that the zemindars were securities for the re-payment of the amount overdrawn, or that the original sureties, when they undertook all the Treasurer's liability, could be said to have contemplated the present right of action. We have referred to Addison on Contracts, on the claim of sureties, and can find there no cases which would support the position taken up by the plaintiffs. In fact, we cannot admit that there is any privity between the zemindars and the sureties, or that the latter can look to any one but the Treasurer.

The decree against the Treasurer, which this person has not raised on appeal, will of course stand ; but, on the ground that there is no privity shown between the sureties and the defendants, and that the former have not made out the legal iability of the latter, we must reverse the decision of the Lower Court in the fou cases, and decree the appeals with costs.

The 8th March 1864.

Present :

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Evidence—Survey Maps—Title—Julkur.

Case No. 359 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 25th April 1862.

Thakoor Bromma (Defendant) *Appellant,*

versus

Thakoor Lullitnarain Deo (Plaintiff) *Respondent.*

Mr. C. Gregory and *Baboo Dwarkanath Mitter* for Appellant.

Baboos Chunder Madhub Ghose and *Kalee Kishen Sein* for Respondent.

Survey maps are not evidence of title in a dispute regarding a right of fishery.

Jackson, J.—PLAINTIFF brought his suit to recover one-half of the right of fishing in two khoonds or hollows which in the rainy season are covered by the river Bhima, but for the rest of the year are surrounded by dry land.

The river in question which runs north and south has the plaintiff's Mouzah Digha on the east side, and Goorgum belonging to defendant on the west ; both khoonds, it is admitted, lie on the defendant's side of the river.

Plaintiff's statement was that both parties used to fish in the khoonds in common, and divide the proceeds till the year 1265, when the plaintiff's men going down to fish were driven off by the Rajah defendant in person, who took all the fish and refused partition.

The plaintiff's title rested upon certain thakbust maps, which it was alleged gave the river in common to both parties, and thence the plaintiff implied a common right to fish in the khoonds, which it was said went with the river.

The Principal Sudder Ameen gave the plaintiff a decree, considering the thakbust papers and certain proceedings under Act IV of 1840 before the Deputy Commissioner of the Sonthal Pergunnahs conclusive as to plaintiff's right.

This decree we have no hesitation in reversing. Such papers as the thakbust maps produced in this case are no evidence of title at all, even if they bear the favorable construction put upon them by plaintiff, which we doubt.

There was no dispute before the Survey Officer, and no award so as to give even a possessory title. The fact of a map being incorrectly drawn, or a boundary inaccurately set down, does not alter possession, and the mistake, even if undiscovered and uncorrected for 12 years, will not enable a person to come in merely on the strength of such map, and turn another person out of possession.

Something was said of the signature of an agent for the defendant on this map, which the plaintiff apparently sought to make use of as an admission. But the signature was not properly put in evidence, and the agent was not called, so that we could not judge of the nature and effect of the admission.

We decree this appeal, and reverse the judgment of the Court below with costs.

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The 9th March 1864.

Present:

The Hon'ble L. S. Jackson and E. P. Levinge, *Judges.*

Jurisdiction—Transfer of suit—Substitution of heir of deceased plaintiff—Appeal—Interlocutory order—Sections 102 and 103 Act VIII of 1859.

Cases Nos. 271 to 273 of 1863.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 19th February 1863.

Biproo Chunder Joobraj (Plaintiff) *Appellant,*

versus

Ramlochun Deb and others (Defendants) *Respondents.*

Mr. H Stainforth and *Baboo Onookool Chunder Mookerjee* for Appellant.

Mr. J. Cochrane and *Baboo Romanath Bose* for Respondents.

After the transfer of a suit instituted in his Court to the Principal Sudder Ameen s Court, the Judge in the temporary absence of the Principal Sudder Ameen, on application, admitted the appellant as legal representative of the original plaintiff who had died *pendente lite.* The Principal Sudder Ameen, apparently treating this order as a nullity, declared the plaintiff not to be the legal representative. HELD that the Judge had no jurisdiction to substitute the name of the appellant, and that the order of the Principal Sudder Ameen, being in the nature of an interlocutory order under Sections 102 and 103 Act VIII of 1859, was not appealable.

Levinge, J.—THESE were three suits for resumption of lakheraj land, and were instituted in the Judge's Court of the Zillah of Sylhet, by the late Rajah Issen Chunder Manick. The suits were filed on the 4th of July 1862, and transferred on the same day to the Court of the Principal Sudder Ameen. *Pendente lite* the plaintiff died, and the present appellant, claiming to be his legal representative, applied to the Judge in the temporary absence of the Principal Sudder Ameen, to admit him under the 102nd Section of Act VIII as plaintiff on the record. This application the Judge granted on the 16th day of September 1862. The Principal Sudder Ameen, it appears, has treated this order as a nullity; for by an order which the appellant has termed a decree, he has declared the appellant not to be the legal representative, and has dismissed the plaintiff's suit with costs, which will have to be paid by the legal representative of the plaintiff. The finding that the appellant was not the legal representative is embodied in the decree of the Principal Sudder Ameen dated the 19th February 1863.

It appears to us that the Judge had no jurisdiction to substitute the name of the applicant, as the record had been, by his own order, removed from his jurisdiction, and nothing appears to have been done by him to give him jurisdiction again to deal with the record. We are also of opinion that the order of the Principal Sudder Ameen is not an appealable one, being in the nature of an interlocutory order under the 102nd and 103rd Sections of Act VIII; and consequently the present appellant not have been legally put on the record, and having been removed therefrom, cannot appeal to this Court, treating himself as plaintiff under the Judge's order of September 1862. We, therefore, dismiss these appeals with costs; but, inasmuch as there is a decree dismissing the plaintiff's suit with costs, and which is, if unreversed, binding on his heir, we give the present applicant an extension of time, *viz.* thirty days from date of this order, to lodge an appeal in this Court in the regular way, treating himself as the legal representative, when the validity of the decree may be fully tested.

The 14th March 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Mahomedan Law—Gift by father to son—Onus probandi—Revocation of gift—Transfer of property from son to father—Evidence.

Case No. 69 of 1862.

Regular Appeal from a decision passed by Mr. R. Abercrombie, Judge of Dacca, dated the 7th December 1861.

Moulvie Wajeed Ali and others (Plaintiffs) *Appellants,*

versus

Moulvie Abdool Ali and others (Defendants) *Respondents.*

Messrs. R. V. Doyne, G. C. Paul, R. T. Allan, G. Plowden, and *H. Stainforth, Baboo Kishen Kishore Ghose,* and *Moonshee Ameer Ali* for Appellants.

Mr. J. Newmarch, and *Baboos Unnoda Persad Bannerjee, Dwarkanath Mitter,* and *Onookool Chunder Mookerjee* for Respondents.

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Suit laid at rupees 3,28,838-14-1-16.

According to Mahomedan Law, no formal delivery and seisin are necessary to the validity of a gift of property by a father to a minor son.

In a suit to avoid such a gift, the *onus probandi* is on the father.

The rule that an undefined gift of joint undivided property, mixed with property capable of division is invalid by Mahomedan Law, does not apply to a gift by a father to a minor son.

Where a son has divested himself, during his father's life-time, of all interest in property which had been given to him by both his parents, before any legal effect can be given to such a transfer of property, the clearest proof is necessary of good faith and joint dealing between the parties, and also that the father's influence was not unduly exercised for his own advantage.

By Mahomedan Law there can be no revocation of a gift by a father to a son when the donee has alienated the thing given.

Morgan, J.—THIS is an appeal from the decision of the Zillah Court of Dacca, by which the suit of Moulvie Wajeed Ali was, as to the chief portion of the relief asked for, dismissed with costs. That suit was instituted to set aside certain ikrarnamahs and meeras pottahs alleged to have been made by the plaintiff, but the execution of which he denied; and to recover the lands which those documents purported to convey. The plaintiff in the suit was the only son of Moulvie Abdool Ali, the principal defendant. For some years before this suit, there had been violent disputes and litigation between them, and the mutual criminations made by father and son in the course of this suit show the hostile terms on which they continued to live until the death of the son which has lately happened. Since his death disputes have arisen, and litigation is now pending concerning his proper legal representative; and, for the purpose of prosecuting this appeal, we have admitted his widow, Mussamut Abeedonnissa Khatoon, to be his legal representative.

The plaintiff claimed the lands under three hibanamahs or deeds of gift, dated respectively the 14th Maug 1254, the 19th Assin 1256, and the 24th Joiste 1258; the first two being made by his father, the last by his mother, Noorunnissa Khatoon. The defendant Moulvie Abdool Ali, the principal respondent, relied on three ikrarnamahs made by the plaintiff, two of them bearing the same date, the 29th Falgoon 1259, and the third bearing date the 16th Aghrun 1263. By these three documents (which are the ikrarnamahs now sought to be set aside), the respondent contends that the plaintiff conveyed back to him all the lands previously given, and that he is entitled to, at least, a life-interest in the property. These six deeds were all duly registered about the time of their dates. The first deed of gift is denied by the respondent. The three ikrarnamahs are, according to the plaintiff's case, forgeries. The two hibanamahs made in 1256 and 1258 are admitted by the defendant to have been made by him in those years; but he contends that they did not operate as valid gifts according to Mahomedan Law; and that such operation as they at any time had, was controlled by the subsequent ikrarnamahs. The decision of the Court is against the plaintiff and in the defendant's (respondent's) favor upon all these disputed matters.

In this appeal the first objection taken to the decision is that the finding of the Court against the hibanamah of the 14th Maug 1254 is contrary to the evidence. The facts proved were that the respondent had, by gift from his father, certain lakheraj lands, charged with religious trusts in favor of the Durgah Kuddum Russool at Nyabarree; the respondent being appointed by the deed of gift the Mootwullee of the Durgah. By the hibanamah now in question, these lands are given by the respondent to his son. According to the terms of this document, the respondent, after mention of his own old age, gives the property to his son, and adds:—"I put you in possession, and permanently appoint you in the office of Mootwullee, and in the service of the Durgah of Kuddum Russool, making you seated on the worship carpet. You, being in the possession of the said property, and being permanently employed in the said office, may continue to defray the expenses of the aforesaid Durgah Khunka, &c. You being yet a minor for the performance of the afore-mentioned duty on your behalf until you become of age, I appoint Moonshee Culeemoodeen Mahomed. Should any thing happen to the above-named Moonshee (which God forbid) then, until you attain majority, you shall get the duties performed by any one whom your mother, Noorunnissa Khatoon, may appoint in your behalf; and, on being of age, you shall take up the regular management of them; besides yourself I have no other heirs entitled to the said office."

The appropriation of this property to religious purposes is not, according to the evidence (as was indeed admitted), so complete that no surplus is left after payment of the expenses of the Durgah. One of the arguments of the defendant, that the property being wukf and therefore not transferable, he *could not* have made this hibanamah, is perhaps sufficiently answered by the facts that there is some substantial private enjoy-

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ment remaining after fulfilment of the trusts, and that he himself received these lands from his father by a like gift, and again received them back from his son according to the 3rd ikrarnamah, which he relies on. The original document was not produced by the plaintiff, but only a copy from the Registry office. None of the attesting witnesses were called by him; the reason which he assigned for not having summoned them, being they had been bought over by his father. One witness deposed to such a document having been prepared and written by him. The persons said to be the attesting witnesses were examined by the defendant (the respondent), and they denied that they had witnessed any such deed. The Judge's finding is as follows:—"These circumstances cast a degree of suspicion over the deed which, in my opinion, precludes the possibility of its being regarded in the light of a genuine document."

That such a deed was, in fact, registered in 1254 could not be denied. The plaintiff was then a child, and it has not been suggested that he, or others on his behalf, procured this registry. The evidence of the attesting witnesses, which was no doubt to be duly regarded, appears to have been treated by the Court as almost conclusive. They were persons who from their position were probably much under the influence of the respondent, and not perhaps above suspicion. On the other side, the evidence of the writer of the document was corroborated by the production of the registered copy. The original document would probably remain in the father's hands. If so, its non-production might be explained in the same way, as the non-production of the later hibanamah is accounted for. In the 3rd ikrarnamah (a document relied on by the defendant), there is a reference to the possession by the plaintiff of these lands as Mootwullee, which appears in some degree to support this part of the plaintiff's case. In this state of the evidence, we think that the Judge's finding was wrong, and that the first hibanamah was proved.

As to the operation of this document, and the validity of the gift thereby made according to Mahomedan Law, the reasons which we assign for upholding the later hibanamahs are, for the most part, also applicable to this one; but there is not here any evidence produced of suits and legal proceedings concerning these lands in which the father puts forward his minor son as the owner and himself as guardian.

The respondent does not dispute the making of the 2nd hibanamah. The original document was retained by him, and was, after a time, destroyed as useless. The plaintiff produced a copy from the Registry office, according to which after a recital that, "whereas it is evident that at present there is no certainty of human life, and I am passed 55 years of age, and you, my only minor son, and one widow, and childless daughter Fukherunnissa Khatoon, are alive, it will not be strange if you brother and sister should, when I am gone, quarrel with each other and harass yourselves for the property left by me; but the said daughter having inherited a large landed property, such as zemindarees, talooks, &c., from her husband, is passing a very good life. I have conveyed by writing a portion of my landed property to my wife Noorunnissa Khatoon," the defendant gives to the plaintiff the property therein mentioned, and puts him in possession thereof, "so that you, being in the possession and management, &c. &c., and paying the Government revenue, will get your name substituted for my name in the Collector's office, with respect to the said zemindaree and talook; and, being confirmed in my rights, and entitled to sell or give them away, you may continue to be with the greatest felicity in the enjoyment of them to your latest generation. My rights and those of my heirs to them ceased."

The Judge decided that this was a merely colorable gift, and that the respondent never intended that any property should pass by it, or certainly not so long as he lived. He held that the plaintiff was bound to prove that he had received possession of the property, and this the Judge thought he had failed to do; that, as there had been no relinquishment by the father, and no possession by the son, there was no valid gift according to Mahomedan Law.

The general rule of Mahomedan Law, no doubt, requires that, to make a gift valid and effectual, the intention to give should be demonstrated by a relinquishment of the thing given, and an acceptance thereof by the donee. This is the rule between strangers. A gift of property by a father to his minor son is not governed by the above rule (*See* Macnaghten's Principles of Mahomedan Law, Chap. V of Gifts, Section 9). A seisin by the guardian of a minor is sufficient for the minor; and if the guardian is himself the donor and in possession of the property, no formal delivery and seisin is required (*See Ibid*, Section 10). The Court below has

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not adverted to this exception to the general rule; and, by treating the present case as falling within the general rule, the Court has improperly thrown upon the plaintiff the burthen of proving that he obtained possession of the property. What happened after the execution of this hibanamah is thus far sufficiently clear. The respondent for his own purposes caused it to be made generally known that he had given this property to his son. In numerous suits concerning the property and in petitions to the Courts, the respondent describes himself as suing or acting on his son's behalf and as his guardian. He continued in possession; but, as long as the father and son lived together, the father would naturally and (at least during his son's minority) necessarily be in possession of the property. His possession (even putting aside his own public declarations that he was his son's guardian) was as consistent with his son's title, as with his own. The deed itself would naturally remain in his possession as guardian; at least his retention of it is not a circumstance of any weight against the plaintiff. In one of the cases cited (1 Select Reps. 32) it is stated that a gift made by a father to his son not of age, although possession of the subject given be not delivered to the son, is valid in consideration of the power which a father may exercise on the part of his son, *especially when the father gives himself out as a trustee on the part of his son.* In this case the father gave out in many ways that he had made a gift to his son, and that the latter was the owner of the property. After such conduct, the possession of the father must be referred, not to his original ownership, but to his character as guardian. The son may, at the least, say that he had shown a sufficient *primâ facie* case of a valid gift to him according to the requirements of Mahomedan Law; and that the burthen of proving the contrary was on the respondent. With respect to one portion of the evidence offered by the respondent, *viz.* that the gift was fraudulent (*furzee*) and made to put a check on his own extravagance, or (as his witnesses state) to evade certain debts and claims of dower, we think that the son is further entitled to insist that, whatever may be the rights of creditors and third persons, the donor himself cannot be allowed to avoid his gift by proof that it was made with a fraudulent intention to defeat or delay the claims of others. It is fairly to be inferred, from his own verified written statement and the other evidence, that the gift was not merely colorable and was really intended to pass some interest in the property; but whatever may have been his secret intention, we must give effect to his openly expressed acts and declarations. Besides the evidence above referred to, further evidence was adduced by the defendant to show that the gift to his son was only nominal, and that, for every substantial purpose, the defendant continued to be the real owner of the property.

We will take it to be the fair result of this part of the evidence that the defendant himself continued to receive the rents and profits of the property, and that the son was not at any time in actual receipt of them. We have no proof of any claim or demand made by him against his father, or of any account rendered by the latter when the son attained his full age, or at any subsequent period up to the time of the quarrel. The defendant's name continued to stand in the Collectorate books, and no change of ownership was there registered, such as the hibanamah contemplates; but this is not of itself a fact of much importance. The position of these persons must be kept in mind, in considering what inference should be drawn from this evidence respecting the enjoyment of the property. The respondent was in possession of the property, and, in appearance, he was in possession on his son's behalf. His case is that the apparent nature of the whole transaction was not its real nature, the truth being that there never was any gift by him, nor even any intention to give. He had it in his power to show by the clearest evidence, not merely that he, in fact, received the rents, but that they had always been dealt with as his own; and that the books and accounts of the estates so dealt with them, and contained no recognition of his son's interest therein. On the other hand, it is not perhaps surprising that the son, who lived in his father's house on friendly terms with him, did not, on attaining his full age, demand an account of his father's guardianship, or lay claim to the property (which was the chief part of the whole family property); especially if, at that time, he had, as the respondent says, executed ikrarnamahs relinquishing the property to the defendant. Moreover, there was important evidence of ownership on his side, for it appeared that he had given in dower to his wife an 8 anna share of a part of the property contained in this hibanamah, and that this gift was not disputed. It was also

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proved that, in a suit relating to another portion of the property, a formal application was made by his father as guardian that the son having attained his majority be admitted as a party to the suit, and this, after hearing the evidence of witnesses, was ordered by the Court to be done. The conclusion to which we have come is that the gift was not a colorable gift; that the plaintiff in the suit sufficiently proved its validity; and that the defendant (the respondent) failed to show that the property continued in him as his own and unaffected by the gift.

We have now to notice an objection on the respondent's behalf to the validity of a part of this gift which was not taken in the Court below. It is urged that some of the property given is joint and undivided property, some shares of which belong to the respondent, while others belong to strangers, and that an undefined gift of such property is invalid by Mahomedan Law. The authorities referred to are Macnaghten's Principles of Mahomedan Law "of Gifts," Section 6, and the several cases there mentioned in the "Precedents of Gifts."

Before we notice the rule of Mahomedan Law, we may observe that it was admitted that the estates in question called Nuralpore and Idrakpore were for revenue purposes distinct "*estates*," each having a separate number in the Collector's books, and each being liable to the Government only for its own separately assessed revenue. The owner collected his rents from ryots, each of whom was liable to pay a certain portion (say a 10 anna share) of the whole rent of his holding to the proprietor of this estate. The proprietor had a right to this definite payment, and to no more. The ryot after this payment was liable to the proprietor of some other "estate" for the remainder (6 annas) of his rent. Some decisions were cited (S. D. A. 1855, p. 263; 1857, p. 1277; and 1858, p. 1857) to show that the proprietor of such an estate cannot obtain either from the Revenue authorities or from the Civil Courts any further severance of his property.

The principle of Mahomedan Law is thus stated by Macnaghten:—

"The gift of property which is undivided and mixed with other property, admitting at the same time of division or separation, is null and void, unless it be defined previously to delivery, for delivery of the gift cannot in that case be made without including something which forms no part of the gift." The literal translation of the original text is as follows:—"The condition (of the validity of a gift of anything) is that it be *divided when it is capable of division*; that the thing given be distinct from what is not given, and that it be not attached to the thing not given. For instance, if land is given without the crop existing on it, the donor reserving the crop for himself, or the contrary, such gift is null and void. Or, if a tree be given, the fruit hanging on the tree being reserved for the donor, or the contrary, such gift is not valid. Or, if a house or a vessel be given without the property contained in it, the same being reserved for the donor, such gift is void."

Without attempting to reconcile all that is stated on this subject in the authorities referred to, it is sufficient to say that the rule thus laid down does not appear to us to be applicable to a gift of property in the condition which we have described, and does not in our judgment operate to invalidate this gift.

The making of the 3rd hibanamah is not disputed by the respondent. The original having been retained and destroyed by him, a copy was produced from the Registry office. This deed of gift was by Noorunnissa Khatoon, the respondent's wife and the mother of the plaintiff. After reciting that, "it is evident now-a-days, there is no certainty of human life; especially as you are my only son born of my womb, it will not be strange if on my death any one else should, with a view to harass you, dispute with you for my zemindarees, talooks, premises &c," and that she was in the undisputed rightful possession of the property therein mentioned, she gives the same to her son,—the deed proceeds:—"As you are now a minor, your father consented to this hibba in the capacity of trustee and guardian, and I put you in possession of the property of the bequest. You being in the possession, &c.; and in the management, &c. are confirmed in my rights, so that paying the revenue of the landed property as detailed under, and getting your name substituted for mine with respect to it, as also representing me in suits of my name in connexion with the property of the bequests, you may continue to possess and enjoy it with great felicity to your latest generation. Should I or any one professing to be my heir ever lay any claim to it, it shall be void as having no right to it."

Burrobazoo and the other property hereby given belonged to the plaintiff's mother. The respondent contended that some of this

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property was his own, but held in the name of his wife. Even if this were so, which has not been proved, he was consenting to the gift, and it was incumbent on him to prove with respect to these lands that they, like those contained in the 2nd hibanamah, though held by him ostensibly as his son's guardian, were in reality always dealt with as his own property. If the lands were, as we think they were, the property of Noorunnissa Khatoon given by her to her minor son, and possessed by the respondent in his character of guardian, they passed to the son by the gift. The respondent cannot contend that his wife's gift also was colorable; or that if it took effect, it did so, not for his son's benefit, but for his own. Some of these estates like Nuralpore and Idrakpore were joint property, and the same objection was made to the validity of the gift. We think for the reasons already stated that the objection is untenable.

Before we proceed to consider the effect of the three ikrarnamahs on which the respondent relies, we will shortly notice the condition of this family at, and previously to, the execution of those documents.

So far as we can ascertain, the respondent's wife, Noorunnissa Khatoon, died about a year after the execution by her of the last mentioned hibanamah. She left a son, the plaintiff in the suit, and a daughter Fukroonissa (who is mentioned in the 2nd hibanamah). According to the appellants, the plaintiff became of age in 1261, and not before. This is denied by the respondent, who says he reached his majority in 1255. No issue was framed on this point in the Lower Court, and the matter was not apparently much contested there. The evidence satisfies us that he became of age in or about 1261. The respondent had another wife Eftakharunnissa; the time of his marriage with her is not shown, but he subsequently in Ashar 1263 married Ameerunnissa Khatoon. There were no children by these two marriages. The first cause of the strife between father and son has not been explained. They were probably on bad terms in 1263, if not before. In 1264 the dissensions were open and violent, when the son quitted his father's house, and went to live elsewhere. In Kartick 1264, the son granted a lease of Nuralpore for 10 years. About this time leases of Burrobazoo were granted to different persons by the father and son. These were followed by disputes for the possession of the land in the Magistrate's Court under Act IV of 1840, the father and son and their respective lessees, Messrs. Barry and Wise, being the contending parties.

Two of the ikrarnamahs relied on by the respondent bear the same date, the 29th Falgoon 1259. The finding of the Court below is that these ikrarnamahs "have been attested by the subscribing witnesses, whose evidence is above suspicion, being that of men of undoubted respectability and good character." The Judge adds :—"I see no reason for regarding these ikrarnamahs with suspicion, and pronounce them genuine and valid documents."

Both of these documents bear the signature of the plaintiff, and were duly registered. One of them relates to the lands contained in the 2nd hibanamah (of the 19th Assin 1256); the other relates to the lands in the 3rd hibanamah (of the 24th Joyste 1258). The former is addressed by the son to his father. It recites:—"I am your only son; you, having no other son, have great affection for me; and, as my mother, Noorunnissa Khatoon, and step-mother Eftakharunnissa Khatoon, are living, to prevent any future contention with any one, you have kindly conveyed to me, by a hibanamah, dated the 19th Assin 1256, your purchased zemindarees. I have accordingly conveyed by writing the half 5-6-4-2 of the 10-13-11 share of the said Pergunnah Nuralpore to my wife Khodezannissa Khatoon *alias* Fukkinnee Bebee, in lieu of the debt for the Caubin, and I am in possession as proprietor of the whole of the remaining property stated above." Provision is then made for future brothers and sisters including step-brothers and step-sisters; after which follows this :—"In lieu of the 5 annas share of the said Pergunnah Nuralpore that I have conveyed by writing to my wife, I shall transfer to my brothers an equivalent portion out of my share in the aforesaid landed property. I have, in the foregoing manner, made my brothers and sisters sharers of the property of the hibba and in its profits. As a matter of course, until the hoped for brothers and sisters are born, and the property allotted, my power to sell or give away any portion of it ceased, nor can it be sold or made liable for my debts. The whole of the property mentioned in this agreement is, during your life-time, to be in your possession and management."

The latter of these two ikrarnamahs is addressed by the son to his mother. It recites the hibanamah made by her, and it describes

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Burrobazoo as "property left you by your mother;" and another zemindaree (Turfa Hawallee Jehanabad) as "purchased and conveyed to you by my father in lieu of Caubin." It proceeds:—"Whereas, you my mother and my father are both living, there is, if God favors, probability of brothers and sisters being born to me; but, by reason of your having conveyed your property to me by a hibba, you are not possessed of such property as may afford means of livelihood for my hoped for brothers and sisters. It then becomes me to fix some rules with respect to the property of the hibba, for the welfare of my hoped for brothers and sisters." Provision is then made for his sister Kurrumunnissa, and for his future brothers and sisters. The concluding part of this deed is to the like effect as the other ikrarnamahs.

Both documents by their terms assume previous valid gifts of the property to the plaintiff. Their effect is to make provision for his sister Kurrumunnissa (the daughter who is described in the 2nd hibanamah as having received from her husband a large landed property) and for future brothers and sisters. Some provision is also made for his mother by the latter ikrarnamah. The father has the possession and management of the whole property for his life. Subject to the rights thus created, the remaining interest of the donee in the property is left untouched.

The respondent Abdool Ali was nearly 60 years of age at this time. His wife Noorunnissa Khatoon, who is described in his written statement as being in ill health in Joyste 1258, died. The probability of children being born to him by Noorunnissa, or by his other wives, was of the most remote kind. The substantial operation of these deeds, and, probably, their true object was to give to the respondent for his life all the property, as well that which had passed to the plaintiff by the gift of his mother, as that given to him by his father.

We should very reluctantly interfere with the finding of the Lower Court that these ikrarnamahs are genuine. They were registered when made. Whether any change took place in the mode of enjoyment of the property afterwards does not appear. It is not probable that they remained unknown to the plaintiff until the year 1264, as we understand him in effect to allege in his plaint. However this may be, we cannot regard without suspicion the transaction to which the documents relate. We think it has been proved that the son at this time was a minor living with his father, who was his guardian, and in possession and management of the property which had been given to him by both his parents. By these deeds, the son divests himself of all interest in his property during his father's life-time. If any legal effect can be given to such a transfer of property, the Court may fairly expect the clearest proof of good faith and just dealing between the parties, and also that the father's influence was not unduly exercised for his own advantage. Not only is such proof wanting here, but the terms of the documents seem designed to hide from the son the real object for which they were framed.

The 3rd ikrarnamah relied on by the respondent is of later date. It bears date the 16th Aghrun 1263, and purports to be sealed by the plaintiff, but it is without his signature. The Court below pronounces in favor of this ikrarnamah also, adding "the ikrar is not of any importance to the present subject of dispute, being merely intended to make some provision for a wife whom the defendant Abdool Ali had lately taken unto himself." This ikrarnamah is addressed by the son to his father. It recites the two deeds of gift made in 1256 and 1258, and that, according to them, the son had since been in possession of the property as the proprietor. It proceeds thus:—"On a former occasion I have executed separate letters of agreement to you and to my mother, the said Khatoon, stipulating therein that the property so bequeathed to me, and other property as per schedule, shall remain in your possession and control as long as you may live, I having no right to sell or dispose of it by gift; that, on a uterine brother of mine being born, the property of my mother's bequest was to be equally shared by him and me; and that on a sister and a step-brother and step-sister being born, I should make monthly allowances to them. Whereas you have now married Ameerunnissa Khatoon, daughter of the late Moulve Ali Afzul, a very respectable Mahomedan, inhabitant of Bunmaldeo, there is, by the favor of God, a probability of son and daughter, that is to say, my step-brother and step-sister being born by you from the womb of the said Khatoon; but by reason of the property mentioned in the schedule having been bequeathed to me, you have no property left you by means of which, &c. It is therefore necessary that, for the welfare of the hoped for son and daughter, some rules be laid down for the division of the property bequeathed to me as per schedule." Provision is then made for the children of this marriage. The deed proceeds:—"I have continued to be

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the Motwullee of the property appertaining to the Durgah of Kuddum Russool in Nyabarree; after the usual expenses of the Durgah are defrayed with the profits of it, the residue that is derived by way of khodemee (service) will likewise be equally shared by me and my brother, &c. My step-mother, the said Khatoon Saheba, during her life-time, will get 125 rupees per month, &c. The landed property conveyed to me by hibba, as mentioned in the schedule, as well as other landed property, is agreeably to the condition of the agreement executed by me in your possession, and it will so continue in your possession, management, and control as long as you are alive, with which neither I nor my heirs will interfere, nor even claim it. Should I or my heirs ever lay any claim to it, it shall be null and void."

At this time the plaintiff had attained his majority. The lakheraj property subject to religious trusts, which the plaintiff says passed to him by the 1st hibanamah, is included with the other property in this ikrarnamah. Provision is made for the expected issue of this marriage (the respondent was now upwards of 60 years of age) and a monthly annuity given to the wife. The terms in which this ikrarnamah refers to the father's life interest in the property given by the two ikrarnamahs are to be noticed. It was contended by the respondent's learned Counsel that his life interest under the several ikrarnamahs was not a beneficial interest, but a trust for the benefit of the family. The words of the 3rd ikrarnamah, like the former documents, seem rather to contemplate a beneficial interest in himself. His own view, as stated in the 4th para. of his written statement, seems to be to this effect. This ikrarnamah stands on different grounds from the two former. The testimony of the witnesses adduced in support of it is not expressly noticed by the Judge, but we may infer that he deemed it sufficient. It is remarkable that such a document should be unsigned. It bears the seal of the plaintiff, but it is in evidence that the father had this seal in his possession, and used it at least on one occasion by affixing it to a bond (*see* the proceedings in the suit No. 45 of $\frac{1851}{1264}$.)

The two meeras pottahs (dated respectively 15th Aghrun 1263 and 6th Jeyt 1264) purporting to be made by the plaintiff in favor of Ameerunnissa, which the plaintiff in this suit seeks to have set aside, are also unsigned, but are sealed with the plaintiff's seal. These two documents are repudiated on all sides, and are admitted to have no validity. The contents of the ikrarnamah are of themselves calculated to rouse suspicion. The time of the marriage of the respondent with Ameerunnissa did not long precede the open quarrel between the father and son. Probably their dissensions may in some degree have been increased in consequence of that marriage. At least the occasion hardly required the plaintiff to settle for the benefit of the expected issue of that marriage (if this is really the effect of this ikrarnamah) property which he had withheld from the two former settlements, or to give his father a larger interest than he already had done by the former ikrarnamahs.

We have come to the conclusion upon the whole of the evidence that this ikrarnamah was not executed by the plaintiff.

The respondent executed a wukfnamah, which has been registered. This is the instrument referred to by him in the 11th paragraph of his written statement :—" I have given up all hopes of being rendered happy by my heirs, and of their preserving the properties, and so have granted away the whole wukf for religious purposes only, settling by hibba some undefined portion thereof for the maintenance of the said heirs."

This document was in evidence in the Court below, but no question was there made respecting its operation. The Counsel for the respondent contending that it operated as a revocation of the previous gifts, the following issue was framed under the provisions of the Code of Civil Procedure :— " Whether the deed of wukfnamah made by the respondent Moulvee Abdool Ali operated to revoke any and which of the previous gifts to his son."

By the Mahomedan Law it is said a gift to a son may be revoked at any time, as the father has power over the property of his son. By the same law there can be no revocation of a gift when the donee has alienated the thing given. In the present case, part of the property given was bestowed by the plaintiff on his wife. The remainder has, according to the case put forth by the respondent, been dealt with on the footing that it had, after the gift to the son, been re-conveyed by him to his father for his life. It is upon the interest thus acquired by the respondent under the ikrarnamahs that he bases his defence to the present suit.

Whatever by Mahomedan Law may be the exact limits of the power of revocation in the case of a gift by a father to his son, we think in this case that it is too late for the

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father, the property having been thus dealt with, to revoke the gift. This right to revoke is claimed generally, but it clearly can have no existence whatsoever in regard to the property which the plaintiff acquired by gift from his mother.

The decree of the Court below is reversed with costs. Confining ourselves to the matter in issue in the present suit, our decree will proceed on the basis of the validity of the three deeds of gift, and the invalidity of the later documents. We shall declare that Moulvee Waheed Ali was in his life time, and that those who are now by law his heirs and representatives, are entitled to a decree for setting aside the documents relied upon by the respondents, and for the recovery of the property sued for.

The 14th March 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Sale (in execution of decree subsequently reversed)—Recovery of land—Mesne profits.

Case No. 906 of 1863.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 7th December 1861, *reversing a decision passed by the Sudder Ameen of that District, dated the 7th December* 1860.

Sheikh Bhoolloo and others (Plaintiffs) *Appellants,*

versus

Ram Narain Mookerjee and others (Defendants) *Respondents.*

Baboos Ashootosh Dhur and *Tarrucknath Sein* for Appellants.

Baboos Kissen Sucna Mookerjee, Chunder Madhub Ghose, and *Gopeenath Mookerjee* for Respondents.

A sale of land, in execution of a decree pending appeal and subsequently reversed, cannot stand, and the party dispossessed under that decree is entitled to recover the land with mesne profits.

Morgan, J.—In this case Ramnarain Mookerjee and another, special respondents, obtained a decree for rent against the special appellant, against which decree an appeal was preferred. The Appellate Court, reversing the decree of the Lower Court, remanded the case for re-trial, when a decree for a sum less than the sum originally decreed was passed in favor of the said special respondents Meanwhile, before the order of remand, but pending the proceedings in remand, the original decree was executed by the said special respondents, and lands belonging to the special appellants were sold and were purchased by the decree-holder himself (the special respondent) with full knowledge of the remand proceedings, and made over to the husband of another respondent, the appellant before the Lower Appellate Court. The special appellant brought this suit to reverse the sale, and to recover possession with mesne profits of the lands sold, and urged that the sale being made in execution of a decree subsequently reversed cannot stand. The first Court decreed the claim. The Judge, on the appeal of the widow of the party to whom the purchased lands were made over, reversed this decree. The plaintiff not having paid the amount of the first decree, and the first and second decrees differing only in the amount decreed, and the sale having been legally and properly conducted, the Judge held it could not be set aside on the ground that the decree on execution of which it was effected, was afterwards modified in regard to the amount decreed. Against this order the special appellant has appealed to this Court.

We think that the decision of the Lower Appellate Court is wrong. On the reversal of the decree in execution of which the sale took place, the sale itself made while that decree was under review fell, and could not be upheld by the subsequent decree. On the second decree being passed, the plaintiffs in the former case became entitled to execute that decree; and on the first decree being reversed, the sale to the plaintiffs became of no effect, and the decree-holders, who had received the proceeds of the sale, became liable to return the money. In this case the decree-holders being also purchasers, they have not actually to return any money, but upon no ground can the sale to them be maintained. If the sale is illegal, the special appellant is entitled to recover his lands; and as he has been wrongfully dispossessed, he is entitled to recover also mesne profits from all the defendants. The delay which he has allowed to intervene between his cause of action, and the period of his instituting this suit, may be a sufficient ground for refusing *interest* upon mesne profits. The special appellant should not be allowed to recover his lands and to obtain the mesne profits, until he has satisfied the amount of the decree with lawful interest.

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The order of the Lower Appellate Court will be reversed, and this appeal be decreed with costs and interest.

The special appellant is entitled to recover the property with wasilat and costs, and is bound to pay the amount of the decree obtained against him by the special respondents Ramnarain Mookerjee and another. These amounts, however, when ascertained should be set off against each other, that is to say, the amount of the said decree with interest should be set off against the wasilat and costs payable by Ramnarain Mookerjee, and execution will issue only for what shall remain due after such set-off. The respondents will be liable in execution for wasilat for the time of their occupation.

The 14th March 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Limitation—Deduction—Summary application.

Special Appeals from a decision passed by Mr. J. E. S. Lillie, Officiating Judge of Hooghly, dated the 26th August 1862, *affirming a decision passed by Mr. A. Davidson, Principal Sudder Ameen of that District, dated the 20th December* 1861.

Case No. 154 of 1862.

Wooma Churn Mitter (Plaintiff) *Appellant,*

versus

Ranee Mohamoya and others (Defendants) *Respondents.*

Mr. R. T. Allan for Appellant.

Baboos Nil Madhub Sein and *Bhoobun Mohun Roy* for Respondents.

Case No. 2920 of 1862.

Shamachurn Chatterjee and others (Defendants) *Appellants,*

versus

Joygopal Chatterjee and others (Plaintiffs) *Respondents.*

Baboo Prosunno Coomar Sein for Appellants.

Roy Sreenauth Sein for Respondents.

Case No. 2387 of 1863.

Special Appeal from a decision passed by Mr. A. Hope, Officiating Judge of Hooghly, dated the 15th April 1863, *affirming a decision passed by Mr. A. Davidson, Principal Sudder Ameen of that District, dated the 30th May* 1862.

Woomachurn Mitter (Plaintiff) *Appellant,*

versus

Rajah Bejoy Kishore Roy Bahadoor (Defendant) *Respondent.*

Baboo Kedarnath Mozumdar for Appellant.

Baboos Nil Madhub Sein and *Bhoobun Mohun Roy* for Respondent.

In a suit for possession by a purchaser at a sale in execution of a decree, no deduction from the period of limitation can be allowed for the time occupied by the plaintiff in unsuccessfully preferring a summary application in the Execution Department.

Trevor, J.—PLAINTIFF purchased certain property at a sale in execution in 1845. Defendant purchased the right and interest of the same parties in the property in 1849, and obtained possession of his purchase.

Plaintiff sued in 1861 for possession of the property which he purchased in 1845.

Defendant pleaded that he purchased the right and interest of a party in possession; that he acquired possession of his purchase; that the plaintiff had never been in possession of the property within 12 years of the institution of the suit, and, therefore, is out of Court under the Statute of Limitation.

The Lower Court dismissed plaintiff's claim, considering that he was out of Court under the Statute of Limitation.

Plaintiff now appeals specially, urging that defendant's title having only commenced in 1849, that is, less than 12 years before the institution of his suit, he cannot, by an adverse possession during that time, bar his claim; that, moreover, as he was preferring a claim summarily in the Court to the property, he is entitled to a diminution of the time during which his claim was pending.

The plea of the plaintiff will not hold water. He never obtained possession of his purchase; the proprietors remained in possession; their rights and interests were sold and purchased by defendant in 1849; thus the defendants are the representatives by purchase in the estate of the old proprietors, and their united possession, which is adverse to the plaintiff, reaches back to the period at which his cause of action arose, *viz.* 1845, and thus he is out of Court under the Statute of Limitations. Moreover, plaintiff is entitled to no deduction for any time; his unsuccessful summary application forming no reason why he did not prosecute his claim regularly within 12 years from the origin of the cause of action.

These three appeals, two of the plaintiff, and one of a *pro-formâ* defendant, are dismissed with costs.

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The 14th March 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Mahomedan Law—Guardianship of infant.

Cases Nos. 484 and 485 of 1863.

Regular Appeals from a decision passed by Mr. F. J. Cockburn, Officiating Additional Judge of the 24-*Pergunnahs, dated the* 29*th June* 1863.

Case No. 484 of 1863.

Shahzada Futteh Ali Shah (Defendant) *Appellant,*

versus

Shahzada Mahomed Mukeem Ooddeen and others (Plaintiffs) *Respondents.*

Messrs. R. T. Allan and *C. Gregory* for Appellant.

Mr. R. E. Twidale and *Moulvie Murhummut Hossein* for Respondents.

Case No. 485 of 1863.

Shahzada Futteh Ali Shah (Defendant) *Appellant,*

versus

Mussamnt Fuzeeluttunnissa Bebee and others (Plaintiffs) Respondents.

Messrs. R. T. Allan and *C. Gregory* for Appellant.

Mr. R. E. Twidale, Moulvie Murhummut Hossein, and *Baboo Nil Madhub Sen* for Respondents.

According to Mahomedan Law, the mother is entitled in preference to the father, to the custody of an infant under 7 years of age.

Kemp, J.—THESE two appeals were tried together. Appeal No. 484 relates to a suit brought by Fuzeeluttunnissa Begum against her husband Mahomed Futteh Ali Shah, to recover the sum of rupees 7,000, being the amount of her dower. Appeal No. 485 relates to a suit brought by Mahomed Futteh Ali Shah against his wife and some of her relations, for the recovery of the person of his wife, and the custody of his infant son.

The Judge decreed the suit of the wife, and dismissed that of the husband.

It appears that the marriage of the appellant, Mahomed Futteh Ali Shah, was contracted with the respondent Fuzeeluttunnissa Begum, with the consent of the guardian of the former. The marriage is admitted, and is strictly legal under the Mahomedan Law. The deed of dower settled a sum of rupees 7,000 on the wife payable on demand. The sum secured by this contract was not partly "moajil" or prompt, and partly "mowjil" or deferred, *i. e.* payable on dissolution of the marriage by divorce or death, as is usual in contracts of this description between parties professing the Mahomedan faith; but the whole sum was payable on demand, and might, under the Mahomedan Law, have been claimed by the lady before consummation of her marriage as consideration for the enjoyment of her person.

The stipulations and terms of this contract were as follows:—

1*st.*—That the husband would pay the sum settled on his wife in lieu of dower on demand, and that he would maintain her.

2*nd.*—That, during the life-time of the wife, the husband was to reside with her under the roof of her paternal grand-father and grand-mother; that, in the event of the lady being unable to reside with her grand-father and grand-mother, the husband would reside with her wherever she might dwell; and that, without her consent, he would not remove her to any other residence.

3*rd.*—That he would be lenient to her faults.

4*th.*—That, without her consent, he would not marry another wife.

It is admitted that the sum secured to the wife by the marriage contract has not been paid. It is further admitted that the wife is residing in the house of her paternal grand-father and grand-mother, and no misconduct on her part has been attributed to her. The husband, on the other hand, appears to have neglected his wife, and to have sought to remove her against her will from the protection and good influence of her relatives. The wife is willing to cohabit with her husband, but very naturally insists upon the strict terms of the contract as to the domicile being enforced. The husband is, therefore, legally bound by his contract, and must pay the amount of dower settled on his wife and reside with her in the domicile contracted for.

With reference to the custody of the child, a son admittedly considerably under the age of seven (*see* the plaint of the husband), we are of opinion that the mother is the proper person to have charge of the infant, and this opinion is in conformity with the principles of the Mahomedan Law as laid down in pages 385 and 388 of Vol. I. of the Hedaya.

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The decisions of the Additional Judge are, therefore, confirmed, and the two appeals of Mahomed Futteh Ali Shah dismissed with costs and interest.

The 14th March 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Lakheraj—Resumption of—by Zemindar.

Case No. 463 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 10th April 1863.

Mahomed Munsoor (Plaintiff) Appellant,

versus

Umbica Churn Roy and others (Defendants) *Respondents.*

Mr. C. Gregory and *Moulvy Murhumut Hossein* for Appellant.

Baboos Sreenath Doss and *Bhuggobutty Churn Bose* for Respondents.

Before a Zemindar's right to resume, as invalid lakheraj under Section 30 Regulation II. 1819, lands in excess of 100 beegahs can be declared to be barred, it must be shown that the lands are held under a sunnud in excess of 100 beeghas, or under different sunnuds each in excess of 100 beegahs.

Steer, J.—THIS is a suit to resume beeghas 204-11 of land as invalid lakheraj under Section 30 Regulation II of 1819. The plaint does not aver whether the land is held under one grant or several, but the land is composed of many parcels in different places, but all in the same village.

The defendant pleads in answer that the land being in excess of 100 beegahs, the right to resume it does not belong to the plaintiff, but to Government. He maintains that they existed previous to 1790 as lakheraj.

The Principal Sudder Ameen, being of opinion that, as the lands are above 100 beegahs, and the Government alone is entitled to sue for their resumption, declares the plaintiff's suit to be dismissed on that ground with costs.

We think that this suit is not necessarily barred because the area of the lands sought to be resumed is in excess of 100 beegahs. Before the plaintiff's right to sue can be declared to be barred, it must be shown that the lakheraj lands are held under a sunnud in excess of 100 beegahs, or under different sunnuds each in excess of 100 beegahs. Though the plaint does not distinctly say that the land is held under different sunnuds, it must be inferred that that is the plaintiff's case, otherwise he could not sue at all. The defendant does not claim that he holds the land under one sunnud, therefore there is a total absence of any evidence upon the point as to whether the lands are held under one or more sunnuds, each above or below 100 beegahs; and unless there is this evidence, the plaintiff's suit cannot be said to be barred.

The case must therefore be remanded in order that it may be ascertained whether the defendant holds under one or more sunnuds, each in excess of 100 beegahs; and if the contrary should be ascertained, there will be no bar on that ground for a trial of the case on the merits. The case is therefore remanded for re-trial accordingly.

The 15th March 1864.

Present:

The Hon'ble H. T. Raikes and W. S. Seton-Karr, *Judges.*

Recovery of Government Revenue paid by lessee.

Case No. 1568 of 1863.

Special Appeal from a decision passed by Mr. E. F. Lautour, Judge of Patna, dated the 31st December 1862, affirming a decision of the Principal Sudder Ameen of that District, dated the 23rd May 1862.

Jhoo Bhugguth and others (Plaintiffs) *Appellants,*

versus

Syed Tara Hoom Hossein and others (Defendants) *Respondents.*

Baboo Gopeenath Mookerjee for Appellants.

Baboo Romanath Bose and *Moulvy Syed Murhumut Hossein* for Respondents.

A, as mâlik, gave a lease to *B*, who gave a *katkina* lease to *C*. *A* defaulted, and *C*, having paid the Government revenue, sued *A* and *B* to recover the amount, but got a decree against *B*. *A* meanwhile sold the estate to *D*; and *B* having sued *D* for the repayment of the amount recovered from him under *C's* decree.—HELD that the debt due to *B* was only a personal liability on the part of *A*, for which neither the estate nor *D* was liable.

Raikes, J.—THE pleader informs us that his client, the plaintiff in this case, held a zur-i-peshgee lease of some rent-free lands which were, subsequent to his lease, resumed

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by Government, and a settlement concluded with plaintiff's lessor as mâlik. Plaintiff was allowed to hold his lease, and he eventually created a kutkina lease under himself.

In the course of time the mâlik defaulted, and plaintiff's lessee, the kutkinadar, sued both the mâlik and plaintiff for recovery of money paid by him on account of Government revenue, and the kutkinadar got a decree in 1259 to recover the amount from plaintiff. Plaintiff then sued in the present action to force a re-payment of this money from the mâlik, a third party, as his vendee, the mâlik having sold the estate to this person to escape liability for this debt. The plaintiff's claim has been decreed against the old mâlik, but plaintiff seeks in this special appeal to have the liability of the lands declared for the debt as one which had accrued before the mâlik sold the lands to the new purchaser.

As, however, it appears to us that the debt due to the plaintiff is only a personal liability on the part of the old mâlik, plaintiff cannot recover from the estate, nor from the new purchaser. This point is therefore untenable.

The pleader also urged that he should be allowed to recover all arrears paid by him, although the Court below has given him only a decree for 12 years before suit. This we consider is correct under the circumstances of the case, and we therefore dismiss this appeal with costs.

The 15th March 1864.

Present:

The Hon'ble H. T. Raikes and W. S. Seton-Karr, *Judges.*

Hindoo Law—Adoption (of only son by a Sudra).

Case No. 1651 of 1863.

Special Appeal from a decision passed by Mr. E. F. Lautour, Judge of Patna, dated the 12th December 1862, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 16th April 1862.

Mussamut Tikdey *alias* Moha Ranee (Plaintiff) *Appellant,*

versus

Lalla Hureelall and others (Defendants) *Respondents.*

Mr. A. F. Lingham for Appellant.

Mr. R. T. Allan for Respondents.

The adoption by a Sudra of an only son as a *kurta putro* is not illegal under Hindoo Law.

Raikes, J.—In this case the plaintiff sued on the ground of heirship to oust an adopted son, and the plaintiff disputed the genuineness of the deed under which the adoption was pleaded. The Judge, in confirming the decision of the first Court, has held that the deed of adoption was genuine, and overruled a point of law regarding the validity of the adoption, holding that, as the family were Sudras, no exception could be taken to the selection of an only son as a *kurta putro.*

The plea in special appeal is that, as the son taken was the elder and only son of his natural father, his adoption is illegal under Hindoo Law.

The pleader, however, has not shown us any authority for thus questioning an adoption made by a Sudra; and, though it is allowed that a father should not give up his eldest or an only son for adoption by another, we are not shown any reliable authority on the illegality of such selection when once made and acted upon.

We dismiss this appeal with costs.

The 15th March 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Witness (Default of Plaintiff when summoned as)—Section 170 Act VIII of 1859.

Case No. 1399 of 1863.

Special Appeal from a decision passed by Mr. J. C. Dodgson, Judge of Mymensing, dated the 13th February 1863, reversing a decision passed by the Sudder Ameen of that District, dated the 12th September 1862.

Kisto Coomar Chowdhry (Plaintiff) *Appellant,*

versus

Gobind Coomar (Defendant) *Respondent.*

Baboos Sreenath Doss and *Kalee Mohun Doss* for Appellant.

Mr. R. T. Allan and *Baboo Dwarkanath Mitter* for Respondent.

Where a plaintiff was summoned as a witness and did not attend, and the first Court, instead of enforcing his attendance or proceeding to pass a decree against him under Section 170 Act VIII of 1859, tried the case on the merits and gave the plaintiff a modified decree,—

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HELD that the Lower Appellate Court, instead of reversing the decision and dismissing the plaintiff's claim on the ground of non-attendance, should have again summoned the plaintiff and then acted under Section 170.

Campbell, J.—IN this case the plaintiff having been summoned as a witness and not appearing, the first Court, instead of enforcing his attendance, or proceeding to pass a decree against him under Section 170 of the Civil Procedure Code, let his recusancy escape with impunity (as is far too often the case in the Courts of Native Judges), and tried the case on the merits, giving plaintiff a modified decree. In appeal the Judge, thinking that the first Court should have enforced the provisions of Section 170, reversed the decision, and dismissed the plaintiff's claim on the ground of non-attendance. But we think that the first Court having waived the order for plaintiff's attendance, it was necessary that the Judge (thinking the attendance necessary) should have again summoned him. He might then have acted under Section 170. We remand the case in order that the Judge may so proceed. This decision has no reference to an order for attendance passed by the Court under Section 42. We understand that the plaintiff was simply summoned as a witness.

The 15th March 1864.

Present:

The Hon'ble W. Morgan and Shumboonauth Pundit, *Judges.*

Relinquishment—Section 7 Act VIII of 1859.

Case No. 454 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Kotechandpore, in Zillah Jessore, dated the 6th June 1863.

Prosunno Chunder Bannerjee (Plaintiff) *Appellant,*

versus

Kally Persaud Ghose and others (Defendants) *Respondents.*

Baboos Dwarkanath Mitter, Bungshee Buddun Mitter, and *Chunder Madhub Ghose* for Appellant.

Baboos Unnoda Persad Bannerjee and *Sreenath Doss* for Respondents.

Suit laid at rupees 5,624-0-2.

Where, in a former suit to set aside the sale of a tenure, the plaintiff, in specifying the lands subject to that tenure, excluded a portion of the lands once included therein as having been by a survey award included in the adjacent talook,—HELD that the exclusion of such land from the former suit was not a relinquishment within the meaning of Section 7 Act VIII of 1859 so as to affect the plaintiff's right to maintain the present suit.

Morgan, J.—THE plaintiff appeals from the decree of the Principal Sudder Ameen of Kotechandpore, dismissing the suit of the plaintiff which was brought by him as owner of a talook called Gocoolnuggur, to recover 937 beegahs of land forming, as he alleged, part of the talook.

The Principal Sudder Ameen held that, by the proceedings in a former suit, the present suit was barred according to the provisions of the 7th Section of Act VIII of 1859. That Section declares that "every suit shall include the whole of the claim arising out of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained." The former suit was by Sookmoy Mookerjee, who was then the owner of Gocoolnuggur, and who, before that time, had been the owner of a gantee tenure consisting of about 1,000 beegahs of land. The object of that suit was to set aside a sale of that tenure for arrears of rent, and the suit was brought against the persons who are the defendants in the present suit, who purchased the tenure. In his plaint in that suit, Sookmoy Mookerjee stated that, although he sought to set aside the sale, he claimed only 509 beegahs, or thereabouts, of the land included in the gantee tenure (being the portion of the 1,000 beegahs situated in Bullubpore), the remainder of the land having been (he stated in the plaint) by an award of the survey authorities included in the adjacent talook of Gocoolnuggur. Sookmoy's suit was dismissed. The land now sued for, or some portion of it, is the land excluded by Sookmoy from the former suit. It is difficult to understand how the 7th Section of the Code of Civil Procedure is applicable to such a case. If a plaintiff relinquishes part of his claim, in order that his suit for the remainder may be brought within the (limited) jurisdiction of a particular Court, he cannot afterwards sue for the part relinquished. But there was no relinquishment by Sookmoy in his suit, either for the purpose of giving the Court

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jurisdiction, or for any other purpose, of any portion of his claim. He sought to set aside the sale of the tenure ; and, in specifying the lands subject to that tenure, he assigned certain reasons for excluding a portion of the lands which had once been included therein. The exclusion of such land from the former suit by Sookmoy in no way affects the plaintiff's right to maintain the present suit.

The Principal Sudder Ameen's decree is reversed, and the suit is remanded under the 351st Section for investigation on the merits.

The 16th March 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Time for rejecting appeal.

Case No. 1583 of 1863.

Special Appeal from a decision passed by Mr. O. Tooyood, Judge of Cuttack, dated the 15th December 1862, affirming a decision of the Principal Sudder Ameen of that District, dated the 10th April 1862.

Gopee Bullub Roy (Plaintiff) *Appellant,*

versus

Goluck Proshad Bose (Defendant) *Respondent.*

Mr. C. Gregory and *Baboo Tarucknath Sein* for Appellant.

Mr. R. T. Allan and *Baboos Obhoy Churn Bose* and *Kishen Kishore Ghose* for Respondent.

The time for rejecting an appeal is when it is presented, and not after it has once been admitted.

Campbell, J.—It appears that, in the Court of the Judge, the petition of appeal had been accepted and registered, the other party had been summoned, and some months after, when the case came on for trial, the Judge, discovering certain deficiencies and want of precision in the petition of appeal, rejected it under Section 336 of the Civil Procedure Code. This we think that the Judge had no power to do. It was the duty of the Judge (himself or through his officers) to examine the petition of appeal in the first instance, and to reject it, if necessary, (before registering it) at a time when the petitioner would have had the opportunity of correcting it, or of filing a fresh petition. It is quite irregular and unjust, and not contemplated by the law, that the petition should be thus rejected at a long subsequent period. If the petition, having been improperly admitted, is then found to be defective, the Judge can still question the appellant, and thus supply what is wanting. But he cannot then reject the appeal without adjudication, and when, through his own omission, the time for filing a fresh appeal has passed. We remand the case for trial on the merits, with reference to the above remarks.

The 16th March 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Boundary dispute—Oral evidence.

Case No. 366 of 1864.

Regular Appeal from a decision passed by the Judge of Cuttack, dated the 31st March 1863.

Goluck Chunder Bose (Defendant) *Appellant,*

versus

Rajah Sreemurd Rajeshuree Biddiadhur Soondeah Nurrender Bahadoor and others, (Plaintiff) *Respondent.*

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* for Appellant.

Baboo Obhoy Churn Bose and *Moulvy Murhumut Hossein* for Respondent.

In a boundary dispute, oral evidence is quite insufficient to establish either the fact of possession or of title.

Steer, J.—This is a boundary dispute and involves the question whether the lands and water referred to by the parties belong to Killah Royung on the Koodakoola river, the property of the plaintiff, or to Killah Hurrispoor, the property of the defendant.

The plaintiff was ousted, as he avers, by an Act IV award passed on the 10th May 1850. He institutes his present suit to cancel that award, and to obtain possession of the lands referred to therein on the 30th December 1861, that is to say, his dispossession took place nearly 11 years and 8 months before the institution of the present suit. It is incumbent therefore on the plaintiff, who has allowedly been out of possession for a period as almost to be barred, to show by some reliable evidence that he has had possession within the 12 years immediately preceding the institution of the suit.

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His own statement is that the lands sued for are the identical lands which on a survey (made as it appears in 1840-41-42) were mapped as part of Killah Royung, and pillars were erected thereupon to form land-marks between the two estates of Killah Royung and Killah Hurrispoor, the respective properties of the plaintiff and defendant. Subsequent to this, there was a great inundation, and the waters carried away the boundary pillars. After a time, but after what space of time is not exactly stated, the features of the lands reverted to their original condition, when a dispute arose as to which of the two Killahs of Royung or Hurrispoor the lands belonged, which was finally decided against the claim of the plaintiff on the 10th May 1850.

The defendant denies the accuracy of this statement, and maintains that the lands have been in his possession for very many years, and that the Statute of Limitation bars the plaintiff's suit.

The Judge did lay down the issue of limitation, and he decided it. On this subject his words are :—"The Court, having heard the arguments adduced this day, finds that this action is not barred by the Statute of Limitations." No reasons are given for this opinion, and we need hardly observe how very irregular and unsatisfactory the Judge's decision is in consequence of this omission. We infer, however, that the Judge was satisfied that limitation had not been incurred, because the survey map of 1840-41 and 42, and the map of the locality, as made for the purposes of this suit, showed that the lands claimed lay within the boundary assigned to the plaintiff's estate. That may be, but it is the plaintiff's own statement that after 1842 a flood swept over the lands and carried away all trace of their boundaries. When that happened is not stated ; but in 1850 there is no dispute that the lands were in possession of the defendant ; and had the plaintiff waited 4 or 5 months more in instituting his suit, he would have been by his own showing out of Court. It is to little purpose to say he was in possession before the flood of 1842. What is required that he should do is to show either that the lands did not exist 12 years ago, which is not his case, or that being in existence, he held possession of them within 12 years, which is in fact his case. On this latter point the only evidence which can be called evidence is the testimony of some few of the plaintiff's own tenants. Gopeenath Patuck, one of these witnesses, says he paid the plaintiff rent for the lands and water in dispute previous to the plaintiff's dispossession in 1850. He says he also paid his rent, amounting to 200 rupees annually, to the Collector, when the estate, during the plaintiff's father's time, was under attachment ; but no chelans for this rent, and no receipts for it, are offered as corroborating the testimony of this witness, and no other witness is in any better position in this respect. The only documents put in as evidence are copies of some kubooleuts, but these are no evidence at all and afford no proof that they refer to the lands now in dispute.

Except oral testimony then, there is no evidence at all of the plaintiff's possession, and oral evidence in a boundary dispute is as a rule quite insufficient to establish either the fact of possession or of title.

On this account we differ entirely from the opinion recorded by the Lower Court on the point of limitation ; and holding that the plaintiff has entirely failed to show that he has ever been in possession of the lands, the subject of this suit, within 12 years from the filing of his plaint, we reverse the judgment of the Lower Court, and dismiss the plaintiff's suit with costs and interest.

The 18th March 1864.

Present :

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Appeal—Section 73 Act VIII of 1859.

Case No. 689 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 13th February 1863, affirming a decision passed by the Moonsiff of that District, dated the 30th August 1862.

Achumbah Paurey (Defendant) *Appellant,*

versus

Ramsahoy Paurey and others (Plaintiffs and Defendants) *Respondents.*

Baboo Kalee Kissen Sein for Appellant.
No one for Respondents.

Where a co-defendant (a co-sharer with the plaintiff in the property in dispute) was thought by the Judge to be a necessary party as respondent in the appeal,—HELD that the Judge should, under Section 73 Act VIII of 1859 and otherwise, have caused him to be made a respondent instead of dismissing the appeal.

Morgan, J.—IF the Judge thought that the co-defendant (who was a co-sharer with the plaintiff in the property in dispute) was

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a necessary party as respondent in the appeal, he should have taken measures, under the 73rd Section of the Code of Civil Procedure and otherwise, to have caused that person to be made a respondent. Instead of doing this, he dismissed the appeal. His decree is wrong and must be reversed, and the case remanded to him for trial of the appeal.

The 19th March 1864.

Present:

The Hon'ble H. T. Raikes and W. S. Seton-Karr, *Judges.*

Lakheraj—Resumption of—by Putneedar—Fraud—Evidence.

Case No. 383 of 1863.

Regular Appeal from a decision passed by Baboo Sreenath Biddiabagish Roy, Principal Sudder Ameen of East Burdwan, dated the 25th March 1863.

Shebosoondurce Debea and others (Plaintiffs) *Appellants,*

versus

Syud Mahomed Ali and others (Defendants) *Respondents.*

Baboo Baney Madhub Banerjee for Appellants.

Baboos Kally Mohun Doss and *Kedarnath Chatterjee* for Respondents

Suit laid at rupees 9,382-2-3.

Oral evidence of witnesses deposing in general terms is not sufficient to establish fraud on the part of a former putneedar in converting mal lands of the putnee in excess of 100 beegahs, into rent-free lands, so as to entitle the present putneedar to resume them as invalid lakheraj.

Raikes, J.—THE plaintiffs sue to resume 198 beegahs 7 cottahs and 13 chittacks of invalid lakheraj land within their putnee talook, on the averment that the lands were held originally as mal lands by Syud Khyrut Ali, who took the putnee in 1790, and fraudulently converted these lands into lakheraj; that Khyrut Ali's heirs continued to hold them, and some of the defendants have a mokururee lease, and others profess to have purchased them at auction. Plaintiffs sue under Regulation XIX of 1793 and Section 30 Regulation II of 1819. The defendants dispute the right of the plaintiffs to institute resumption proceedings against them, as the land exceeds 100 beegahs. They also plead the document by which they are prepared to support the validity of their title to hold the lands rent-free.

The Principal Sudder Ameen has dismissed plaintiffs' claim on the ground that the lands are in excess of 100 beegahs, and plaintiffs therefore have no right to resume them The Principal Sudder Ameen relies upon the precedent of the late Sudder Court dated the 26th May 1860, in the case of Mr. A. Forbes *versus* Sheik Sumdam.

In appeal before us the pleader has urged that, as Government reserved to the zemindars the right of resuming all lands held rent-free on invalid titles within their estates, the putneedar, whose rights are identical with those of the proprietor, has the right to call upon all occupiers of lands within his putnee to prove the titles under which they profess to hold their lands without paying rent, and therefore the *onus* of proof lies on the defendants in this case.

It appears to us, however, that the Lower Court has rightly dismissed the plaintiffs' claim in this suit. Plaintiffs admit that the lands are in excess of 100 beegahs, but assume that they have a right to resume them, because they originally formed part of the mal lands of the putnee, and were fraudulently converted into rent-free lands by a former putneedar who, with his heirs, had continued to hold them as such to the detriment of the putneedar. We find that the plaintiffs attempted to prove this part of their case by the evidence of witnesses who depose in general terms that Syud Khyrut Ali had so acted. But oral evidence of this nature, unsupported by anything else, is not sufficient to establish such a case of fraud on the part of a former putneedar. Plaintiffs therefore have, in our opinion, failed to start their case by showing that the lands in suit were ever mal lands of his putnee, and the lands being more than 100 beegahs and not therefore resumable by plaintiffs in the absence of a valid lakheraj title, plaintiffs have no ground of action for maintaining this suit.

We, therefore, dismiss this appeal, and affirm the judgment of the Lower Court with costs of this appeal on the appellants.

The 21st March 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Sureties.

Case No. 462 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 30th April 1863.

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Shibnarain Bannerjee (Plaintiff) *Appellant,*

versus

The Government (Defendant) *Respondent.*

Baboos Unnoda Persaud Bannerjee and *Dwarkanath Mitter* for Appellant.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Respondent.

Suit laid at rupees 6,044-2-8.

Where a Salt Darogah deposited Government notes as security for the due performance of the duties of his office, and authorized the Government Salt Agent, in case of loss to Government by his (the Darogah's) misconduct or by his failure to realize advances made to the Molungees, to sell the notes and apply the proceeds in satisfaction of the Government claim, and the Government, without any consent by him, altered his position and risk,—HELD that such alteration relieved him from his engagement as surety.

Morgan, J.—THE appellant is the plaintiff in this suit. He appeals from a decree of the Principal Sudder Ameen of the 24-Pergunnahs, dismissing his suit against the Salt Agent of the zillah for the recovery of 5 Government notes, for the sum of 5,200 rupees deposited as security for the due performance of the duties of his office of Salt Darogah.

In October 1855, upon the re-establishment of this Salt Agency, the appellant was appointed Salt Darogah of Aurung Takal ; and on the 7th November following, he executed two documents (a kubooleut and an ikrarnamah), by the first of which he undertook to discharge the several duties therein specified ; among others that he would be careful that the whole of the money advanced to molungees should be discharged from the salt manufactured by them ; that if the quantity made by any molungee fall short, "I shall try my best to recover from him the Government outstandings, and make it over to Government. Should I be unable to recover it, I shall, within one month from the ceasing of the manufactory, refund out of my own pocket, without objection, the whole of the money advanced." By the ikrarnamah he authorised the Salt Agent, in case of loss caused to Government by his (the appellant's) misconduct, or by failure to realize advances made, to sell the Government securities held in deposit, and to apply the proceeds in satisfaction of the Government claim any deficiency being recoverable from the other property of the appellant.

Shortly, before the end of the first year of manufacture, the appellant received from the Agent a purwannah, dated the 25th September 1856, communicating to him an order given by the Board of Revenue (on the Agent's representation of the past unfavorable season) to the following effect that a 4th part of the unrealised outstandings be deducted from the advances now to be made, the realisation of the rest of the outstandings be for the present stopped, but collected from the quantity of supply over and above that undertaken by the Shajoonees. In the same purwannah the Agent states that he had been asked by the Board of Revenue to give his opinion with regard to the ultimate recovery of these outstandings, the opinion of the Board being that they might be wholly recovered at the settlement of the accounts of the next year, or from the first advance made in the succeeding year.

After the end of the 2nd year of manufacture, the appellant sent in accounts of the sums due by the molungees in respect of previous advances, and of the sums due to the molungees for salt made by them. From the sum due he proposed to deduct not only the advance made to the molungee himself, but also any sum due from another molungee for whom the former might have become security. The Agent, by a purwannah dated the 12th October 1857, prohibited any deduction on account of any suretyship engagement, but sanctioned the proposed arrangement in other respects.

About this time the salt manufacture was discontinued, and a few months later, in March 1858, the appellant was discharged from his office. In the following July he was employed by the Salt Agent to collect outstanding balances due from molungees, receiving a commission of 20 per cent. on his collections, and he continued in such employment until April 1860.

This suit instituted in December 1861 is brought to recover the Government notes deposited by the plaintiff as security, on the ground that the Agents of the Government have, by their conduct and proceedings, wholly discharged the plaintiff from all liability as surety in respect of outstandings due from molungees, and that the Government securities cannot be detained, as the Government claims a right to detain them, until such outstandings have been realised.

The appellant who had engaged to secure the re-payment by the molungees of the sums advanced to them in the manner and upon the terms contained in his kubooleut, and upon those terms only has certainly been placed, by the conduct of his employers, in a new situation, and exposed to risks to which he would not otherwise have been liable. The effect of the purwannah of the 25th

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September 1856 was to prohibit the appellant from realising the outstandings, and to give to the molungees, to whom its contents were made known, further time for payment. If this increase of risk and extension of time has been brought about without the appellant's consent, he is in our opinion discharged from all liability as surety. He contends that he never consented, and that his consent cannot be inferred merely from his continuance in the service, and his compliance with the purwannahs from time to time addressed to him by his official superior, whose orders he was bound to obey. He also contends that the terms of his subsequent employment show that the Government no longer regarded him as liable as surety. We understand the Principal Sudder Ameen's decision to proceed mainly on the ground that the plaintiff had by his acquiescence and conduct sufficiently shown his consent to the new arrangement.

Several purwannahs from time to time addressed to the appellant are referred to by the Principal Sudder Ameen, and some of these were relied on by the Government pleaders on the argument of this appeal as shewing, when taken with the appellant's conduct, that nothing had occurred to release the appellant from his original liability. We have read the several purwannahs filed, which are dated 17th and 25th March, 30th April, 29th October, 25th November, 21st, 24th, and 29th December 1857, and 11th January, 9th and 22nd February, 9th March, and 28th December 1858.

The general effect is to urge on the appellant the necessity of realising the outstanding balances: no distinct allusion is made in them to any continuing liability in the appellant as surety for those balances. It was the duty of the appellant to collect and receive from the molungees the sums due by them to the Government, and this was his duty equally whether he remained liable as surety for their default or not.

His continuance in his office until the close of the agency, his omission to object to the arrangement contained in the purwannah of September 1856, and his conduct with reference to the other purwannahs and generally, are not, in our opinion, sufficient to authorise an inference that he consented to continue surety under the altered circumstances. Considering his position as a servant, his mere silence and his obedience to orders, cannot fairly be construed to amount to an implied consent on his part. We think therefore that there has been no consent by him to any alteration of his position and risk, and that the alteration made without his consent has relieved him from his engagement as surety. Had this been a suit by the Government against him to enforce his liability as surety, we should have held him entitled to a decree. The present suit is, as we have stated, one brought by him to recover his Government securities deposited to secure the due performance of all his duties as Darogah, as well as his suretyship obligation; and he is entitled to recover them, unless he is shown in some way to have failed in his duty. The contest in this suit throughout has been with reference to his liability as surety.

There, are indeed, both in the evidence and in the judgment, indications that the appellant was charged with neglect or misconduct in making advances. No issue concerning this was framed by the Court, or asked for on behalf of the Government, and we must now take it for granted that the only question in dispute between them was that of the appellant's liability as surety. Since in our judgment he was discharged from all liability in that respect, he is entitled to recover his securities. We reverse the judgment of the Lower Court, and decree this appeal with costs.

Shumboonath Pundit, J.—I wish it to be understood that I do not intend by this decision to decide whether Government can or cannot hereafter bring an action against the appellant for recovery of damages, which he, during his service, might have caused to his employers by his neglect or any fraudulent transactions, nor to decide whether in such a case the present appellant can or cannot successfully plead that, after appellant's present suit, such a claim could be raised by Government only in defence to this case. I think it also right to remark that at one time I was of opinion that justice required that this Court should order Government to produce in this case all the papers and accounts connected with the advances made by the appellant still due from the molungees; but finding that the pleader for Government, as well as plaintiff himself opposed this step, and considering with reference to these and other circumstances of this case that this Court would not be justified in compelling the defendant to produce these papers against his wish as expressed through Counsel, I abandoned the idea and decided the case as it was brought and defended on both sides respectively.

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The 22nd March 1864.

Present:

The Hon'ble Sir Barnes Peacock, *Kt. Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Sale by Hindoo widow.

Case No. 246 of 1863.

Application for review of judgment passed on the 6th February 1863 in Special Appeal No. 1490 of 1862.

Rajah Jha and others, *Petitioners*,

versus

Mussamut Parbutty Ojhain and others, *Opposite Party*.

Baboo Kalee Kishen Sein for Petitioners.
No one for Opposite Party.

Where a plaintiff sought to set aside a sale by a Hindoo widow upon the ground that there was no necessity to sell, and the Judge found against him on that point,—HELD that his suit necessarily failed, and that it was not necessary for the Judge to enquire in this suit as to whether there was a necessity to raise money for religious purposes; for even if there had been no necessity on that ground, the purchaser could not have been turned out of possession without a refund of that portion of his purchase-money which went to discharge the debt, and the plaintiff was not bound to tender that money in the widow's life-time.

Peacock, C. J.—THE plaintiff sought to set aside the kobalah upon the ground that there was no necessity to sell at all. It was decided by the Judge that there was a necessity to raise 1,950 rupees for the payment of a debt of that amount due from the late husband of the widow. That being found, the plaintiff's suit, as he brought it, necessarily failed. It was not necessary for the Judge to enquire in this suit as to whether there was a necessity to raise money for religious purposes; for, even if there had been no necessity on that ground, the purchaser could not have been turned out of possession without having that portion of his purchase-money which went to discharge the debt refunded. The plaintiff was not bound to tender that money in the widow's life-time, and he did not in his plaint offer to do so. Should he, after the widow's death, offer to pay the amount applied in payment of the debt, we are disposed to think that the decision in this case will not be binding against him, so far as to preclude him from raising the question as to the purchaser's right, notwithstanding the offer, to retain the property upon the ground that there was a necessity to raise money for religious purposes, or, at any rate, that the purchaser made due enquiry upon that subject. We cannot grant a review in this case, because the decision was right, the plaintiff not having offered to pay the purchaser the 1,950 rupees. Notwithstanding the opinion above expressed, it must be understood that we do not intend finally to decide whether the decision in this case will preclude the plaintiff after the widow's death from raising the question as to that part of the purchase-money, which is said to have been applied for necessary religious purposes, in a suit properly framed for that purpose.

The application for a review must be rejected with costs.

The 22nd March 1864.

Present:

The Hon'ble H. T. Raikes and W. S. Seton-Karr, *Judges*.

Limitation (Act XIII of 1848)—Order of Deputy Collector under Regulation VII. 1822—Minority.

Case No. 408 of 1863.

Regular Appeal from a decision passed by the Judge of Midnapore, dated the 18th May 1863.

Modhoosoodun Sing and others (Plaintiffs) *Appellants*,

versus

Rajah Peertee Bullub Paul and others (Defendants) *Respondents*.

Baboos Kishen Kishore Ghose and *Juggadanund Mookerjee* for Appellants.

Baboos Sreenath Doss and *Hem Chunder Banerjee* for Respondents.

Suit laid at rupees 2,626-6

The order of a Deputy Collector under Regulation VII. 1822, declaring the lands in dispute to be Paykan Jagheer lands, is an award within the meaning of Act XIII of 1848, and must be sought to be set aside within 3 years.

No deduction on account of minority or other legal disability can be made from the period of limitation prescribed by that Act.

Raikes, J.—THIS suit was brought for possession of 545 beeghas 5 cottahs of land in Mouzah Bunsguria. The Lower Court has held the plaintiff barred by the limitation prescribed by Act XIII of 1848, and plaintiff in appeal urges that the order of the Deputy Collector which declared these lands to belong to the paykan jagheer lands was not an award of the nature contemplated by Act XIII of 1848; or that, if it be so, the minority

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of the plaintiff will prevent its operating to his disadvantage.

The first point taken by the pleader was the effect to be given to the Deputy Collector's proceedings, which have been held by the Judge to constitute an award and to bring plaintiff under the special limitation prescribed by Act XIII of 1848.

Now we find that the Deputy Collector was deputed to ascertain and identify the lands comprised in the paykan jagheer appropriated for the maintenance of the paiks of Midnapore; and with this object he set on foot enquiries as to the lands then in the occupation of the paiks in the different villages of the district. Regarding the lands now in suit, there was at the time of his enquiry a dispute pending under Act IV of 1840, and he called for the proceedings already had in the case; and after hearing evidence, came to the conclusion that the lands had been and were then in the occupation of the paiks, and in conformity with that finding, decided the dispute then pending, by declaring the defendants entitled to keep possession of the lands. As we observe that the Deputy Collector was directed to hold the general enquiry under Regulation VII of 1822, and that Regulation empowers Revenue Officers to settle all cases of disputed possession in respect to any lands to which their proceedings relate, we are of opinion that, as the question of these lands being paykan lands or mal lands of the present plaintiff was a question which arose in the course of the Deputy Collector's proceedings, it was necessary for him to determine the same. This he did so far as the authority under which he acted requires him to do, by deciding upon the possessory rights of the parties before him, and the decision so come to constituted in our opinion an award under the meaning of Act XIII of 1848. Any party, therefore, dissatisfied therewith was at liberty to bring a suit to set it aside, provided such suit was instituted within three years of the Deputy Collector's order. This has not been done by the plaintiff, and his suit is therefore barred by the terms of the Act. The decisions of the late Sudder Court have already ruled that the special limitation of the Act, when once it has commenced to run, does not stop for the good and sufficient reasons which are allowed to affect the general law of limitation. We, therefore, cannot take into consideration any such plea as minority. We uphold the judgment of the Court below, and dismiss this appeal with costs.

The 30th March 1864.

Present:

The Hon'ble H. T. Raikes and W. S. Seton-Karr, *Judges.*

Registration (Act XIX of 1843)—Registered deed of Sale—Unregistered lien.

Case No. 1829 of 1863.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 31st March 1863, reversing a decision passed by the Sudder Ameen of that District, dated the 20th September 1862.

Bissonath Singh (Plaintiff) *Appellant,*

versus

Raj Chunder Roy and others (Defendants) *Respondents.*

Baboo Poornoo Chunder Mookerjee for Appellant.

Baboos Ramanath Bose and *Banee Madhub Banerjee* for Respondents.

A registered deed of sale gives the vendee no preferential right under Act XIX of 1843, to avoid an unregistered lien given by the vendor to his judgment-creditor.

Raikes, J.—The pleader urges that, as the deed of sale was registered, and the lien given by his vendor to the judgment-creditor was not registered, special appellant's deed of sale should give him a preferential right under Act XIX of 1843. But we consider the provisions of Act XIX do not apply, as appellant's vendor had only given a lien on the property he sold, which lien does not deprive appellant of the estate subject to the lien, and he is only required to pay it off if a *bonâ fide* encumbrance, and therefore his title is not invalidated by its creation. Consequently the Act does not apply, and we dismiss this appeal with costs.

The 30th March 1864.

Present:

The Hon'ble H. T. Raikes and W. S. Seton-Karr, *Judges.*

Review.

Case No. 1758 of 1863.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 18th April 1863, affirming a decision passed by the Sudder Ameen of that District, dated the 8th November 1861.

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Hurro Chunder Chuckerbutty and others (Defendants) *Appellants*,

versus

Ramkissore Chuckerbutty and others (Plaintiffs) Respondents.

Baboo Greeja Sunker Mojoomdar for Appellants.

Baboo Hem Chunder Banerjee for Respondents.

Where a case is admitted to review by the deciding Judge, and tried afterwards by another Judge, the new Judge ought to try only the point directed by the order of review.

Raikes, J.—THIS case was admitted to review by the deciding Judge, and tried afterwards by another Judge, and the ground of special appeal is that the new Judge did not try the point directed by the order of review. We find this is the case. The review was granted upon the production of new evidence purporting to show that the plaintiff's title only justified him in suing for an eight annas share in the lands, and not for a 12 annas share as claimed by him. The new Judge, however, only looked upon the fresh evidence with regard to the support it gave to the defendant's pottah, and not with reference to the extent of the plaintiff's right in the lands as required by his deed of purchase. We must, therefore, remit the case to the Judge, to be tried again with reference to the above remarks. Ordered accordingly.

The 30th March 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Suit for possession—Limitation.

Case No. 1621 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Mymensing, dated the 20th February 1863, affirming a decision passed by the Moonsiff of that District, dated the 25th July 1862.

Tarinee Kishore Acharj Chowdry and others (Defendants) *Appellants*,

versus

Narain Acharj Chowdry (Plaintiff) *Respondent.*

Baboos Baneenath Bose and *Ishur Chunder Chuckerbutty* for Appellants.

Baboos Onookool Chunder Mookerjee and *Grees Chunder Ghose* for Respondent.

In a suit for possession, if the defendant in possession under the order of a competent Court pleads limitation, he is entitled to a clear finding upon it before the question of title is enquired into.

Trevor, J.—PLAINTIFF sues for possession of certain land by the reversal of an Act IV of 1840 case passed in defendant's favor. Defendant pleads continued possession and the Statute of Limitations in bar of the present action. The first Court declared that limitation did not apply, and that plaintiff's title to the land was made out. The second Court considered also that plaintiff had made out his title, but was silent as to the plea in bar.

Defendant now appeals specially, urging that, before entering on the question of title, he was entitled to have a decision of the Court on the applicability or otherwise of the Statute of Limitations.

As defendant is in possession under the order of a competent Court, we think that, on his pleading the Statute of Limitations in bar of the plaintiff's suit, he is entitled to a clear finding on it before the question of title is taken up; and we think that a reference by the Judge to the Ameen's report as to the plaintiff's possession is not a sufficient enquiry on the point. We therefore remit the case to the Judge, with directions that he will lay down an issue in bar as raised by defendant, and from the evidence of the witnesses on both sides determine the point. Should plaintiff's suit be barred, the case falls; if it be not barred, the present judgment on the merits will stand good.

The 31st March 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Agent (Powers of).

Cases Nos. 1643 to 1645 of 1863.

Special Appeals from decisions passed by the Judge of Backergunge, dated the 6th April 1863, reversing decisions passed by

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the Principal Sudder Ameen of that District, dated the 22nd March 1861.

Rajender Chunder Newgee and others (Plaintiffs) *Appellants,*

versus

Mahomed Aynooddeen Moonshee (Defendant) *Respondent.*

Baboos Onookool Chunder Mookerjee and *Bhoyrub Chunder Banerjee* for Appellants.

Baboos Hem Chunder Banerjee and *Rajendernauth Bose* for Respondent.

The assent by an agent to be bound by the statement of a particular witness is not an assent to arbitration, but is an act entirely within the scope of his general authority as agent to carry on his principal's suits and to do all acts necessary to that end.

Trevor, J.—In these three cases plaintiff, special appellant, sues to recover arrears of rent by the reversal of a summary decree passed under Regulation VII of 1799. The case is in the nature of an appeal from the summary judgment of the Revenue authorities. Whilst the case was pending before the Collector, the agent of the plaintiff who was authorized to carry on all his suits in Court, and to do any act necessary to that end, agreed to be bound by the opinion, *i. e.* a statement without oath, of a respectable person named Ramanauth Bose as to the genuineness of certain receipts filed by defendant. The party referred to declared the receipts genuine, and plaintiff's suit was dismissed. Acting on that statement embodied in the Collector's proceeding, the Judge, when the case was before him, considered that the agent had full power to assent to be bound by the statement, and dismissed the claim of plaintiff with costs.

Plaintiff now appeals specially, urging that his agent had no authority to assent to an arbitration, and having acted beyond his authority, the act was one not binding on his principal, and that consequently the suit should be re-tried in order that the genuineness of the receipts might be tested by the other evidence on the record.

We do not certainly consider the act of the agent of special appellant as an assent to an arbitration. It is simply a submission by him to the statement of a particular person upon whose veracity he implicitly relied. This was an act entirely within the scope of his general authority for the management of plaintiff's cases, and as such plaintiff is bound by it. Moreover, we think that the Judge was right in the case before him, which was in the nature of an appeal from the judgment of the Revenue authorities, in considering the statement of Ramanauth Bose as binding upon both the parties who had, before those authorities, through their agents, agreed to accept it as conclusive on the point in dispute between them.

Under this view we reject the special appeal with costs.

The 31st March 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Mortgage or conditional sale (by Hindoo father without son's consent)—Legal necessity.

Case No. 2010 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 18th April 1863, *affirming a decision passed by the Moonsiff of that District, dated the 13th December* 1862.

Purmanund and others (Plaintiffs) *Appellants,*

versus

Musst. Orumbah Koer and others (Defendants) *Respondents.*

Baboo Kishen Sukha Mookerjee for Appellants.

Baboos Debendro Narain Bose and *Grees Chunder Ghose* for Respondents.

A mortgagee, acquiring by the operation of law the possession of an estate mortgaged by a Hindoo father without the son's consent, is bound to enquire whether the debt on account of which the mortgage is given is a legally necessary one or not; otherwise it will not avail him that the Court has on his application declared the mortgage foreclosed, or the conditional sale rendered absolute.

Steer, J.—This is a suit to obtain a share in certain properties in right of inheritance by setting aside mortgages and conditional sales.

It has been found by the Lower Court that, in respect to the mortgage and conditional sale of a 5 anna portion, no necessity was shown for the sale, and therefore the sale by the plaintiff's father, without the plaintiff's consent, was not valid. This sale the Lower Court therefore sets aside.

In respect to the mortgage and sale of another ½ anna share the Lower Court holds that, as the mortgage has been foreclosed

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and the sale under it declared absolute, the Court cannot annul it.

The plaintiff appeals against this part of the judgment, and urges that the Principal Sudder Ameen was quite wrong in supposing that the Civil Court was not empowered to interfere with a sale which has become absolute; that, if the mortgage was without necessity, the Courts declaring it foreclosed, and the sale rendered absolute by mere operation of law, does not prevent the Civil Court from setting aside the sale, if the mortgage in satisfaction of which the sale took place was made by the father without necessity.

It is argued by the pleader for the plaintiffs that the principle of the decision of the Sudder Court of the 8th June 1861 will apply to this case, and that if, as in that case, a sale takes place in execution of a decree against the father with the sanction of a competent Court, the son, though not a consenting party to the debt of the father, is not in a position to question the sale. Therefore, acting on the principle of that case, the mortgagee having after foreclosure sued for possession and obtained it under a decree of a competent Court, the son, though not a consenting party to the mortgage, is not at liberty to question the legal necessity for the mortgage.

But there is obviously a great distinction between the two cases. Where there is a sale in execution of a decree for debt, the purchaser is not bound to look whether there was any necessity for the debt. But in the case of a mortgagee acquiring by the operation of law the possession of a mortgaged estate, he is clearly bound to enquire whether the debt on account of which the mortgage is given is a legally necessary one or not. If he advances money where no legal necessity exists, or without using due diligence to ascertain the existence of such legal necessity, it will not avail him that the Court has on his application declared the mortgage foreclosed, or the conditional sale rendered absolute. If there was no legal necessity for the defendant, there was no necessity for the mortgage; and if the mortgage can, as it no doubt can, be set aside, so can all the other proceedings upon the mortgage.

We therefore remand the case that the Lower Court may enquire whether, with respect to the ½ anna, there was a legal necessity for the debt contracted by the plaintiff's father, and decide accordingly.

The 31st March 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Purchaser (Rights of—of property subject to another's charge).

Case No. 744 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 19*th January* 1863, *affirming a decision passed by the Sudder Ameen of that District, dated the* 28*th November* 1862.

Jummon Chowdry and others (Defendants) *Appellants,*

versus

Mundur Bebee (Plaintiff) *Respondent.*

Moonshee Ameer Ali and *Baboo Kissen Sukha Mookerjee* for Appellants.

Baboo Debendro Narain Bose for Respondent.

Where a party acquires property as purchaser with notice of its being pledged to another, he can no longer rely upon his claim to the property as having been previously hypothecated to him.

Morgan, J.—The decree of the Court below seems to be correct. The appellant purchased property in December 1857. That property had been previously pledged to the plaintiff in the suit, and the security pledging the property had been duly registered. The appellant, having purchased the property subject to this charge, must take it with that burden. His case is that the property had been, some years before, hypothecated to him, and that he is now entitled to hold it as against the plaintiff by reason of those prior pledges. But as he has acquired the property as purchaser, and with notice of the charge in the plaintiff's favor, he can no longer rely upon his claims in respect to the previous charges. Those have now become merged in his title as purchaser.

We must dismiss the appeal with costs.

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The 1st April 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Appeal (Time for presenting).

Case No. 805 of 1863.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 6th May 1862, *affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th March* 1862.

Maharajah Beer Chunder Joobraj (Plaintiff) *Appellant,*

versus

Mohamed Asgur (Defendant) *Respondent.*

Baboos Onookool Chunder Mookerjee and *Oprokash Chunder Mookerjee* for Appellant.

Moulvie Murhummut Hossein for Respondent.

In computing the time required for obtaining a copy of the decree appealed against, the day on which the stamp paper was deposited, and the day on which the copy was supplied must each be counted.

Morgan, J.—EXCLUDING the day on which judgment was pronounced, the memorandum of appeal was presented to the District Court on the 35th day after the judgment. In computing the time required for obtaining a copy of the decree appealed against, the day on which the stamp paper was deposited (the 17th of April 1862), and the day on which the copy was supplied (the 24th of April), must each be counted. Eight days were therefore required for obtaining a copy; and, excluding these days from the reckoning, the appeal was presented within 30 days, and should not have been rejected.

We reverse the order of rejection, and remand the case for trial by the Lower Appellate Court.

The 2nd April 1864.

Present:

The Hon'ble C. B. Trevor and A. G. Macpherson, *Judges.*

Resumption — Lakheraj lands (beyond 100 beegahs).

Case No. 1692 of 1863.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 3rd March 1863, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the 12th August* 1862.

Rajah Jogendronarain Roy (Plaintiff) *Appellant,*

versus

Hurry Doss Roy (Defendant) *Respondent.*

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Appellant.

Baboos Dwarkanath Mitter and *Mohendro Lall Shome* for Respondent.

When land in extent beyond 100 beegahs is admittedly held by a lakherajdar, the presumption is that it is held under one grant, and that it is resumable by Government and not by the zemindar. In order to rebut the presumption, the zemindar must show that the land, though beyond 100 beegahs in extent, is held under different sunnuds.

Trevor, J.—THE plaintiff sued to resume 115 beegahs of lakheraj land in the possession of the defendant. The defendant pleaded that he held it under valid grant, and that being more than 100 beegahs in extent, plaintiff as zemindar is not entitled to resume it. The first Court gave plaintiff a decree. The Judge on appeal dismissed plaintiff's claim, inasmuch as, on his own showing, the land was in extent above 100 beegahs, and therefore resumable by Government, and not by him.

Plaintiff now appeals specially, urging that the burden of proving that the land was not resumable by him lay on the defendant and not on him, and that the case should be remitted for re-investigation. Moreover, if the Court thought that the burden under the circumstances lay on him, he should have an opportunity of showing that the land was held under different grants.

When land in extent beyond 100 beegahs is admittedly held by a lakherajdar, the presumption is that it is held under one grant, and that it is resumable by Government, and not by the zemindar. In order, therefore, to rebut the presumption, it is necessary for a zemindar suing to resume under these circumstances to show that the land, though beyond 100 beegahs in extent, is held under different sunnuds. If evidence of this nature is not produced, the presumption remains unrebutted and must prevail. This legal necessity is known to all, and if not met, such failure can give no ground for a remand, in order to enable parties to supply this defect in the case caused by their own negligence. We dismiss the appeal with costs.

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The 2nd April 1864.

Present :

The Hon'ble C. B. Trevor and A. G. Macpherson, *Judges.*

Hindoo Law—Inheritance (Boistoms) Suit for share of offerings.

Case No. 1687 of 1863.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 2nd March 1863, *reversing a decision of the Moonsiff of that District, dated the 17th December* 1861.

Jugdanund Gosamee (Plaintiff) *Appellant,*

versus

Kessub Nund Gossamee and others (Defendants) *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Obhoy Churn Bose for Respondents.

In certain cases, a priest may, according to Hindoo Law, be the heir of a deceased disciple.

A suit will lie by one priest against another for a share of offerings actually received by the latter, if there be any contract to pay over such share.

Macpherson, J.—THE appellant (plaintiff) sued to recover from the defendant a share of certain monies received by him as alms and offerings, and also for a share of the estates of certain *boistoms* or disciples which had been appropriated by the defendant. Plaintiff and defendant are both priests, and are alleged to be the heirs and representatives of the deceased disciples referred to.

The Court of first instance gave judgment in the plaintiff's favor. But the Lower Appellate Court reversed that decree. The ground assigned for this reversal is the decision of the Sudder Court to be found at page 907 of the Reports for 1853, which declared that the Government is the only heir of intestate *boistoms*, and that such a suit will not lie. The ruling referred to may be correct in cases in which the *boistom* dies intestate and leaving no heir. But it frequently happens that, according to Hindoo Law, the priest is the heir of his disciple, and it may be that, in this particular case, the plaintiff was entitled to succeed, either alone or jointly with the defendant, to the property of deceased disciples. There is also nothing against the institution of a suit for a share of offerings actually received, if there be any contract to pay over such share. On the whole we think that the case must be remanded, and it must be disposed of by the Lower Appellate Court on its merits, and with reference to these remarks.

The 5th April 1864.

Present :

The Hon'ble W. Morgan and L. S. Jackson, *Judges.*

Compromise—Error—Stamp Duty—Costs.

Case No. 545 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, dated the 28th July 1863.

Luchmun Ram Unooj (Plaintiff) *Appellant,*

versus

Messrs. R. Watson and Co. (Defendants) *Respondents.*

Baboo Mohendro Lal Shome for Appellant.

Baboos Onookool Chunder Mookerjee and *Ashootosh Dhur* for Respondents.

Suit laid at rupees 63,285-6-16.

Where a case was remanded to the Lower Court with various directions including one regarding payment of deficient stamp duty and penalty upon a deed of gift, and on the case reaching the Lower Court, the parties compromised the suit,—HELD that the Lower Court should then have simply disposed of the case in accordance with the terms of compromise and not have proceeded to carry out the order of remand and to require payment of the deficient stamp duty and penalty.

In order to interfere with the discretion of a Lower Court as to costs, the Appellate Court must be satisfied that there has been some miscarriage or mistake.

Morgan, J.—THE two objections which arise upon the hearing of this appeal are, 1*st*, that the appellant has been improperly made to pay a sum of about 1,500 rupees on account of a deficient stamp and penalty upon a deed of gift; and, 2*ndly*, that he has been improperly made to pay the costs of certain defendents, Beharee Loll and Messrs. Watson and Co.

We think he has failed altogether to show, as to the latter objection, that he has any ground of appeal; but that, in respect of the former, he has established a valid ground of objection.

The remand order made by this Court sent back the case to the Lower Court, with various directions respecting the trial of the suit, including a certain direction as to the mode in which the stamp objection was to be dealt with. When the case reached the Court below, the parties compromised the suit, and the Court, having received the instrumen

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of compromise, should have proceeded, under the 98th Section of the Code of Civil Procedure, to dispose of the case, that is to say, the agreement of compromise being recorded, the suit ought to have been disposed of in accordance therewith. The Court should have followed that provision of the Code literally. If it had done so, there would have been an end of the whole suit. But the Court seems to have thought it requisite to follow out the order of remand and the directions therein given, and, in doing so, the Principal Sudder Ameen fixed a time for the trial of the case. The plaintiff, finding that the case was to be tried, notwithstanding that it had been compromised, presented a petition to the Court which resulted in some order or permission given by the Court that this document should be duly stamped and the penalty paid. But the expense of the stamp and penalty was incurred by reason of the improper proceeding of the Court in carrying out the remand order when, in fact, the compromise of the suit entirely disposed of the whole matter, and left no case for trial. The payment of the stamp or penalty, under these circumstances, was unnecessary and was caused by the mistake of the Principal Sudder Ameen. As the stamp and penalty have actually been paid to the Government, we are not now upon this appeal in a position to recall that payment, or to order that the appellant shall receive it. We think that the order made by the Lower Court relating to the deficiency of the stamp was erroneous, and that the Court, by proceeding unduly with the case, has thereby caused the appellant to pay this sum, and that he is entitled to receive it back. It is competent to the appellant to take such measures as he may be advised or deem proper for procuring a refund of the stamp and penalty.

The other objection as to the costs of certain defendants, we think, wholly fails. It is true the plaintiff succeeding in a suit is usually entitled to his costs. But in the present case, the defendants whose costs he has been made to pay are certain persons who were made parties to the suit, as the Lower Court thinks unnecessarily. Before we interfere with the large discretion that the Court that hears a case has with regard to costs, we should be well satisfied that there has been some miscarriage or mistake. As the case stands, there is no reason to think that the Court came to an erroneous conclusion.

The appeal will be dismissed with costs as against Beharee Loll and Messrs. Watson and Co, and they are the only persons who appear. The decree disposing of the suit in accordance with the terms of the compromise will be affirmed; but we shall declare that the orders passed prior to the decree relating to the payment of the deficient stamp duty and penalty, and to the trial of the suit on remand are erroneous.

The 5th April 1864.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Right of Water.

Case No. 1871 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 31st March 1863, reversing a decision of the Moonsiff of that District, dated the 29th July 1862.

Ramruttun Neogee and others (Defendants) *Appellants,*

versus

Phool Singh and others (Plaintiffs) *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboos Chunder Madhub Ghose and *Kally Mohun Ghose* for Respondents.

The owner of two properties may conduct through troughs the rain-water of one property over a water-course to the other property before it reaches that water-course.

Seton-Karr, J.—We have heard this case fully argued on both sides, and have compared the judgments of both the Courts with the map filed in the case. It is clear to us that the defendant wished to restrain the plaintiff from turning to his own use the water which accumulated in his estate of Kurma of which he is the owner, and from appropriating the same to the irrigation of the lands of Mirzapore of which he is the lessee. The lands of these villages lie on both sides of a *pyne* or water-course, into which the rain-water of Kurma would naturally flow. It is not the stream of this water-course which the plaintiff wants to raise or intercept for his own benefit, but the rain-water of one property, for the benefit of another property, before it ever reaches that water-course.

This he has a perfect right to do, and even special appellants, defendants in the Lower Court, admit that, had the plaintiff

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wished to consume the rain-water of Kurma on the lands of Kurma, no opposition could legally have been offered. This being the case, they have no right to prevent the plaintiff from making any other use of the said rain-water, by conducting it through troughs over the water-course to any other property. The case, quoted by both parties of the late Sudder Court, page 1324 of the Decisions for July 1857, is exactly in point. The legal point is decided in favor of the plaintiffs, and we dismiss this appeal with costs.

The 6th April 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Hindoo Law—Sale by widow—Rights of reversioners.

Case No. 807 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 23rd January 1863, reversing a decision passed by the Moonsiff of that District, dated the 20th November 1861.

Mussamut Radha (Plaintiff) *Appellant,*

versus

Mussamut Kour and others (Defendants) *Respondents.*

Baboos Dwarkanath Mitter, Hem Chunder Banerjee, Kally Prosunno Dutt, and *Tarucknath Sein* for Appellant.

Baboos Unnoda Persad Banerjee and *Mohesh Chunder Chowdhry, Moonshee Ameer Ali,* and *Mr. J. Baptist* for Respondents.

The consent of all the reversioners is necessary to make a sale by a childless Hindoo widow valid in law; but the purchaser is entitled to hold the property during the widow's life-time. Only immediate reversioners are entitled to impeach the sale by the widow.

Shumboonath Pundit, J.—SPECIAL appellant is a purchaser from the childless widow (he says) of the uterine brother of the father of Oodit Narain defendant respondent; and the other two defendants respondents, Oomrao Singh and Jeolall, according to the statement of the plaintiff, are the sons of a step-brother of the husband of the said widow.

Plaintiff brought this action to obtain possession of the property sold to him against his vendor. Another party who claimed to hold the property under a zur-i-peshgee lease from the said widow intervened, and was made a defendant. Oomrao and Jeolall, respondents, intervened as next heirs of the husband of the widow, and impugned the validity of the sale made by her, and were subsequently made defendants by the Court trying the case. The vendor admitted the right of the plaintiff, and so did Oodit Narain, who first appeared with an application claiming to be the only next reversioner, and was also made a defendant at the time when the other persons mentioned were so made.

The first Court, among other issues, fixed this, whether Oodit alone or also the other two defendants are the reversioners to the widow, but without trying this fact, decided that, during the life-time of the widow, the validity of her acts could not be impugned. On the merits he decided against the deed of zur-i-peshgee. The zur-i-peshgeedar abided by this decree, and only the opposing defendants appealed. The Lower Appellate Court believing that the sale by the widow was not valid dismissed the claim of the plaintiff.

Against this decree plaintiff appeals to this Court, and pleads that the Lower Appellate Court should have first decided whether the appellants before it were immediate reversioners or not; that, if it had been found that they are not, the Court would or should have noticed that it has been repeatedly decided that those whose interests are more distant than those of the immediate reversioner cannot be allowed to raise any question regarding the validity of the sale by the widow. Plaintiff further argues that, if the fact had been proved the other way, he would still be entitled to obtain a decree for possession during the life-time of the widow, even if Oodit had opposed his claim. The opposing respondents argue that the sale by the widow is not proved to be justified by any legal necessity; that, assuming that Oodit is the son of the only uterine brother of the husband of the widow, the sale by her cannot become valid only by the assent of this defendant, without the consent of these two respondents; that, accordingly, they are clearly interested in this case, and entitled to impugn the validity of the acts of the widow. If there be any occasion in this case to decide whether the sale by the widow is or is not valid, with reference to the assent by one who perhaps is the only immediate reversioner, it must be admitted that the assent of such an heir alone, without the consent of the other possible heirs alive, cannot make the sale valid in law.

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The question, however, pressed by the special appellant is this, that no other person than the next reversioner is entitled in this case to raise an issue regarding the validity or invalidity of the alienation of the widow in his favor; that as Oodit, who is the only next heir, does not raise such an issue, it cannot be tried in this case. We hold that it is a settled rule that the interest of others who may be heirs to the estate of the husband of a widow on the death of the immediate reversioner, is too remote to be recognised as giving any cause of action, or any ground to raise any question to impugn the acts of the widow; and if any such right is acceded to the person entitled to succeed immediately after the reversioner, it must necessarily be allowed to many others following the former person. As the appellants to the Lower Appellate Court urge that they also are the sons of a uterine brother of the husband of the widow, it would be necessary to decide this question; but as it is clear that plaintiffs are entitled to hold during the life-time of the widow, even if the appellants are found entitled to oppose the claim, we think it proper to reverse with costs the decree of the Lower Appellate Court, and uphold the decision of the first Court.

Morgan, J.—The plaintiff, having bought from a Hindoo childless widow land which belonged to her husband, sued the widow to obtain possession of it. The defendant, the widow, and another defendant, the immediate reversioner, did not oppose the suit; but two other persons, Oomrao Singh and Jeolall, claiming also to be reversioners, were made parties to the suit, and opposed the plaintiff's claim.

It is clear that the alienation by the widow cannot be supported as an alienation in which the reversioners have joined, because the consent of *all* the reversioners is in such case necessary, whereas here the two last named persons did not assent.

Whether these two persons are immediate or only remote reversioners, has not been ascertained. If they are the sons of Mohun Lall by a different wife, they are not immediate reversioners, and have no right to impeach the widow's purchase. It is unnecessary, in the present suit, to ascertain their pedigree or their relationship with the other reversioner. The plaintiff is entitled to hold the property at least during the widow's life-time, and ought, therefore, to succeed in this suit. The decree of the Court of first instance was to this effect, and should, I think, be restored. I would reverse the judgment of the Lower Appellate Court, and allow this appeal with costs, in effect affirming the judgment of the Court of first instance.

The 6th April 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Limitation — Dispossession under temporary leases—Right to Permanent Settlement—Alluvial Land.

Case No. 89 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Mymensingh, dated the 19th November 1862.

Cally Chunder Chowdhry (Defendant) *Appellant,*

versus

Monikurnika Chowdhrain and others (Plaintiffs) *Respondents.*

Baboos Dwarkanath Mitter and *Onookool Chunder Mookerjee* for Appellant.

Mr. R. T. Allan and *Baboo Bhuggobutty Churn Bose* for Respondents.

Limitation will not count against a party who has been out of possession under temporary leases.

The mere fact of a lessee having received a malikana allowance from the Collector during the period of his temporary lease, will not bar the right to a Permanent Settlement of any party who, under the Law of Alluvion, is entitled to settlement.

Regulation XI. 1825, recognizes only one mode of determining the claims of parties to accreted land, *i. e.* to regard the land as the right of that party to whose estate the land is an accretion, and not to divide and apportion the accreted land according to the extent of each party's loss by diluvion.

Steer, J.—The lands in dispute were declared to be toufeer lands, and were resumed by Government in 1835. The question raised in this suit is as to the right of settlement to these resumed lands.

It appears that, besides the lands declared to be resumed, the Government originally attached a much larger area; but of this so much of the lands were given to the plaintiff and defendant respectively as they appeared to have lost by diluvion of their original estates, according to the quinquennial papers. The rest was considered to have been held exclusive of the original settlement, and, after having been given to the defendant in the suit in temporary leases, was finally declared to be settled in perpetuity with him on the 19th April 1859.

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The plaintiff, averring that the lands are accretions, partly to his exclusive estate No. 380, and partly to estates Nos. 378 and 379 of which he is with the defendants joint proprietors, brings this suit to establish his right to the exclusive settlement of such of the lands as are contiguous to his original estate as recognized and demarcated by the decree of the resumption authorities, and to the joint settlement of those lands which abut upon the other two estates.

The Principal Sudder Ameen was of opinion that, as both parties were considered by the resumption authorities as entitled to the lands of the resumed churs, and both received, in recognition of their right portions of the chur, the chur or that portion of it which was finally resumed by Government, ought to be settled with both the parties, in proportion to what they each obtained out of the chur as the deficit of their original estates.

The defendants appeal. It is urged, 1*st*, that the suit was not brought within 3 years from the final award of the Revenue authorities admitting the defendant to a Permanent Settlement, and that the suit is therefore barred under the special law of Act XIII of 1848.

2*nd*.—That the plaintiff has never been in possession of the lands in dispute, and is not in time under the general Law of Limitation.

3*rd*.—That the plaintiff has given no evidence to show that he is entitled to share in the settlement as regards any portion of the land.

The Permanent Settlement, to set aside which is the object of the present suit, was finally concluded under the order of the Commissioner of Revenue of date the 19th April 1859. This suit to set aside that settlement was instituted on the 19th April 1862. It is contended that, under the precedent of the High Court published in page 301 of Hay's Reports for September 1862, the day on which the award was passed must be counted as part of the three years within which the suit must be brought; and, if so, the suit ought to have been filed on the 18th April 1862, instead of the 19th April 1862.

Mr. Allan, the Counsel for the plaintiff, confesses that the decision quoted is directly against him; but he maintains that the view taken is diametrically opposed to the invariable practice of English Courts of Law.

However this may be, we find, as correctly stated by the same learned Counsel, that the 18th April 1862, on which date it is maintained the plaint ought to have been filed was Good Friday, and there is, therefore, a sufficient reason why it was not filed on that date.

With respect to the general Law of Limitation as bearing upon the present case, it is admitted that, as a general rule, limitation would not count against a party during the term that he was out of possession under temporary leases; but, in the present case, it is alleged that the temporary settlements were made with the defendant in recognition of his proprietary rights; and, as further proof of his right, he received the malikana allowance during the term of those temporary settlements; and it is on this ground that it is contended that the defendant has held adversely for 12 years, and that the plaintiff's right has lapsed.

We think that, during the time that the estate was under the management of the Collector, and as one mode of management under temporary leases, that the rights of parties to the permanent settlement of the lands does not become extinguished by any length of time. It may be leased out over and over again, and notwithstanding that from the date of the first lease more than 12 years may have expired, that fact would not bar the right to settlement of any party who under the law of alluvion has the right of settlement. It is true that the present plaintiff might have sued whenever he felt so inclined to establish his right to be regarded as the proper party, or one of the proper parties, to whom the right of settlement belonged. But he was not bound to sue, for, during a temporary settlement, rights of parties are not extinguished, but are only in abeyance.

Nor are we prepared to admit that the mere fact of the Revenue authorities allowing the defendant a malikana allowance during the period he held these lands on lease, would have the effect of barring the plaintiff's right to a permanent settlement whenever that might be made. The temporary settlement with the defendant gave him no right to the permanent settlement, notwithstanding that he held the lands for a much longer period than 12 years. Length of time would not therefore affect the plaintiff's right to the permanent settlement, and certainly no mere details as to the amount of rent payable, or what remissions the Government chose to allow to its farmer during the temporary settlement, would be ground which necessarily obliged the plaintiff to institute a suit in the Civil Court, for he was

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no party to the settlement. The details may not be known to him, and it is not his business to enquire into them.

But it does not seem to be the fact that malikana was paid to the defendant during the years that he held the lands in temporary settlement. There is no evidence of it, while there is evidence to lead to the conclusion that the malikana was to remain in deposit. If while the Government kept the management, and as the mode of management most agreeable to itself let the lands in farm to the defendant, the rights of the plaintiff were in no way injured, it is for the defendant to prove the special allegation under which he contends that those rights were injured. The plaintiff is not out of Court, unless the defendant has received malikana for more than 12 years. Whether he is so or not on the ground assumed, we do not take upon ourselves to decide; but if a 12 year's receipt of the malikana is the ground on which the plaintiff is out of Court, it is clearly a matter which the defendant is called upon to prove, and he has not proved it. Upon this view we overrule both the limitation points.

In regard to the merits, it is quite clear that the Principal Sudder Ameen has decided on no recognized principle. He thinks that, because each party obtained a slice of the chur to the extent of the loss created by diluvion since the perpetual settlement, the rest of the chur ought to be divided and apportioned in the same way. But the law does not recognize such a mode of dealing with accretions, whereas in the present case land has been gradually gained by the recession of the river. Regulation XI of 1825 only recognizes one mode of determining the claims of parties to the accreted lands. That mode is to regard the land as the right of that party to whose estate the land is an accretion. In the present suit the question to be decided is, to whose estate are the lands in suit an immediate increment? The parties have not been called upon to give this evidence, nor has any map been made to show the present existing boundaries of the two original estates of the plaintiff and defendant respectively, and the position of the lands in dispute with reference to those boundaries.

The case must therefore be remanded for the purpose of further enquiry. The original estate of each must be taken to be what the resumption officers have defined them to be; and whatever other land may be found to exist, must be, disposed of under the law of alluvion, that is to say, that the right to settle for it will be with the party to whose estate the land immediately attaches.

The 6th April 1864.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Onus probandi—Rights of sharers.

Cases Nos. 1941 and 1942 of 1863.

Special Appeals from decisions passed by the Judge of Tipperah, dated the 31st March 1862, affirming the decisions passed by the Principal Sudder Ameen of that District, dated 19th July 1861.

Case No. 1941.

Sreemutty Urnopoorna and others (Defendants) *Appellants,*

versus

Rajbullub Burdun and others (Plaintiffs) *Respondents.*

Baboo Onookool Chunder Mookerjee for Appellants.

Baboo Roopnath Banerjee for Respondents.

Case No. 1942.

Obhoy Chunder Burdun and others (Defendants) *Appellants,*

versus

Sreemutty Urnopoorna and others (Plaintiffs) *Respondents.*

Baboo Roopnath Banerjee for Appellants.

Baboo Onookool Chunder Mookerjee for Respondents.

A, in execution of a decree against *B*, purchased *B's* share in an estate, which share was said to be a certain quantity. Subsequently, *A's* representatives absorbed more land than belonged to *B's* share; and in a suit brought to declare their rights in the estate, it was held that there should have been a clear finding as to what was the extent of the share originally purchased by *A*, and that in determining the claim of *A's* representatives to the increase, the burden of a very distinct proof should be laid on them.

Glover, J.—It appears from the record that so far back as 1817 A. D. the representatives of the present special respondents sued for possession of 16*d.* 3*k.* of land in talook Kaleepershad as the property and share of one Gunga. They obtained a decree, and afterwards the land itself in execution of it. This share descended un-

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interruptedly in special respondents' family until the year 1836, when a suit was brought by Kaleeshunker complaining that, instead of the 16*d.* 3*k.* property belonging to Gunga's share, the parties in question had absorbed no less than 36*d.*-1-3-2. The suit was dismissed, and shortly afterwards Kaleeshunker's own rights in talook Manichurn were sold in execution and passed into the hands of the present special appellants. They attempted at once to take possession of what they considered to be their share of the estate, the result of which was a case under Act IV of 1840, and the attachment of the disputed land under the orders of the Magistrate, on the ground that it was impossible to decide who was in possession. The present suit was to remove this attachment and to declare the special respondents' rights in the estate.

We have gone very carefully into this case, and have heard the vakeels on both sides at great length, and are of opinion that there must be a remand. Special respondents are the representatives of Gunga's share, which was noted at the time the decree was passed to be 16*d.* 3*k*, and we do not see on what ground the Judge has decreed to them more than 28*d.* It may be of course, as surmised, that special respondents absorbed, little by little, land that did not belong to them, but that cannot affect the present suit, which is based solely on what was Gunga's share. Had special respondents been all along in possession of the increased quantity of land, it might have been a question whether they could have been ousted in the present suit; but they are confessedly not in possession, and their only ground for demanding to be put in possession of any thing is that their former representatives purchased Gunga's share. This is what the Judge ought to have decided. He should have given a clear judgment as to what was the extent of the share originally purchased by the representatives of the special respondents; and in determining the latter's claim to the increase, we think that the burthen of a very distinct proof should be laid on them. They are legally entitled to Gunga's share only, and it is for them to show how that increased from 16*d.* 3*k.* to 28*d.*

We therefore remand the case to the Judge, in order that he may take up the question of Gunga's share *de novo* and pass a fresh decision with reference to the above remarks. This disposes of appeal No. 1942 also, which will also be remanded for the same reasons.

The 6th April 1864.

Present:

The Hon'ble C. B. Trevor and A. G. Macpherson, *Judges.*

Section 73 Act VIII of 1859—Limitation.

Case No. 373 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of 24-Pergunnahs, dated the 14th May 1863.

Kishen Loll Chowdhry (Plaintiff) *Appellant,*

versus

Chunder Coomar Roy and others (Defendants) *Respondents.*

Mr. John Baptist and *Moonshee Ameer Ali* for Appellant.

Baboo Sreenath Doss for Respondents.

No person ought, under Section 73 Act VIII of 1859, to be added as a plaintiff, whose right of action is barred by the Law of Limitation.

Macpherson, J.—This appeal must be dismissed with costs.

The plaintiff (appellant) instituted the suit in his own name as if he alone were entitled to recover: but he was in truth only the next in reversion, and his mother was the person immediately interested and who could alone legally maintain the suit. Some months after the action was brought, the mother petitioned that she might be added as a co-plaintiff, expressing her assent to the bringing of the suit by the plaintiff, and alleging him to have acted as her agent in the matter. At the time she presented her petition, she was barred by Act XIV of 1859 from instituting a suit for the same cause of action: and Act XIV of 1859 would also have been a bar to the institution *then* of a new suit by the appellant. The Lower Court rightly refused to make the mother a co-plaintiff.

It may be doubted whether the provisions of Section 73 of Act VIII of 1859 can ever be properly applied to a case in which no person legally entitled to sue is an original plaintiff, and it is subsequently sought to add as plaintiff the person by whom the suit should in the first instance have been brought. But at any rate it is clear that, in common justice, no person ought, under Section 73, to be added as a plaintiff, whose right of action is barred by the Law of Limitation. We know of no principle on which it can be contended that the institution of a

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suit by a wrong party can operate to keep alive the rights of one who by his delay has brought himself within the provisions of Act XIV of 1859.

Moreover, the plaintiff in his plaint, which was duly verified, claimed as heir of his maternal grand-father, and not as agent of his mother. If therefore the mother's petition were admitted, and the suit allowed to proceed, the plaintiff at the same time would be permitted to remain before the Court in a legal character different from and unconnected with that in which he originally sued.

On every ground, therefore, we think the mother's application inadmissible ; and as the appellant is admittedly not the heir of his maternal grand-father, we affirm the decision of the Court below with costs and interest.

The 7th April 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Arbitration.

Case No. 457 of 1863.

Application for review of judgment passed by Justices F. B. Kemp and G. Campbell in Special Appeal No. 601 *of* 1863, *on the 5th August* 1863.

Debraj Roy, *Appellant,*

versus

Kartick Chunder Sircar, *Respondent.*

Baboos Bhuggobutty Churn Bose and *Thakoor Chunder Sein* for Appellant.

No one for Respondent.

An award of arbitrators can only be set aside for corruption or impartiality, but not on the ground of its being inconsistent, because the plea of the defendant was proved as to part of the case, and not as to the other.

Steer, J.—THE plaintiff sued for recovery of certain lands, partly lakheraj and partly jumaie, on the ground of inheritance.

The defendant pleaded a purchase of the lakheraj lands, and the acquisition of the jumaie lands on a pottah given to him by the talookdar upon a resignation of the same by Oloong Monee to whom they had belonged.

It appears that, by the consent of both parties, the case was referred by the Court to arbitrators who, in respect to the lakheraj lands, decided for the plaintiff, and in respect to the jumaie in favor of the defendant.

Both parties were dissatisfied with the award, and the Moonsiff decided the suit by a decree in full in favor of the plaintiff, which decision was upheld in appeal by the Principal Sudder Ameen.

The Principal Sudder Ameen does not find that any corruption or partiality is to be attributed to the arbitrators ; but his ground for setting aside their award is that it is inconsistent, because the plea of the defendant was proved in one case, and not in the other. This is no sufficient or legal ground for setting aside the award.

We, accordingly, reverse the judgment and decree the special appeal with proportional costs. The award will stand. The plaintiff getting the lakheraj lands, and the defendant retaining the jumaie lands.

The 7th April 1864.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble F. B. Kemp, *Judge.*

Hindoo Law—Sale by widow—Succession of Nephew (Sister's son).

Regular Appeals from a decision passed by Syud Ahmed Buksh, Principal Sudder Ameen of Dacca, dated the 13*th December* 1861.

Case No. 79 of 1862.

Gobind Monee Dossee (Plaintiff) *Appellant,*

versus

Sham Loll Bysack and others (Defendants) *Respondents.*

Baboo Chunder Kally Ghose for Appellant.

Baboos Onookool Chunder Mookerjee, Nobo Kissen Mookerjee, Chunder Madhub Ghose, and *Kally Kissen Sein* for Respondents.

Case No. 84 of 1862.

Kali Coomar Chowdry and Nund Coomar Chowdry, heirs of Gopeenath Chowdry, deceased, (Plaintiffs) *Appellants,*

versus

Ram Doss Shaha and others (Defendants) *Respondents.*

Baboo Chunder Kally Ghose for Appellants.

Mr. C. Gregory and *Baboos Onookool Chunder Mookerjee, Kally Mohun Doss, Kally Kissen Sein, Chunder Madhub*

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Ghose, Nobo Kissen Mookerjee, and *Hem Chunder Banerjee* for Respondents.

The right of succession accrues to nephews (sister's sons), whether born before or after the death of their maternal uncle, not on the death of the maternal uncle, but on the death of his widow; and the nephews can sue to question the validity of alienations made by the widow without legal necessity.

Though a purchaser for value is not bound to prove the antecedent economy or good conduct of a Hindoo widow who alienates a portion of her husband's estate, or to account for the due appropriation of the purchase-money, he is bound to use due diligence in ascertaining that there is some legal necessity for the loan, and he may be reasonably expected to prove the circumstances connected with his loan.

Kemp, J.—THESE two appeals were heard together, and one decision will govern both.

* * * * * *

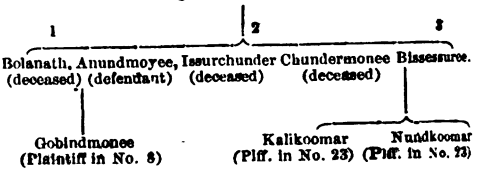
The Principal Sudder Ameen tried the two suits together. * * He found that there was no proof that the suits were under-valued. With reference to the issue in bar, *viz.* whether the suits were barred under the Statute of Limitations, he observed that this question would be tried with the merits; that though, as a general rule, a daughter cannot sue during the life-time of her mother to recover the estate of her father, as has been done in this instance by Mussamut Gobindmonee during the life-time of her mother Anundmoyee, still, as it appeared from the allegations of Gobindmonee that her mother had wasted the whole estate, it became necessary to enquire into and decide whether the alienations made by Anundmoyee and Chundermonee were valid or not.

The Principal Sudder Ameen distrusts the oral evidence adduced on both sides, remarking that it is easy for wealthy persons to bring any number of witnesses to depose to any fact which a party may think proper to aver. He further observes that these two suits must be decided with reference to the documentary evidence adduced. From the documentary evidence filed by those of the defendants who put in an appearance, the Principal Sudder Ameen was of opinion that the alienations made by the two widows Anundmoyee and Chundermonee were made under legal necessity and for purposes such as are sanctioned by the Hindoo Law, to wit, payment of hueband's debts, Government revenue, and maintenance; that some of the properties claimed did not even appertain to the estates of the husbands of the two ladies; and that some had been sold long before the succession opened out to the two ladies and had been transferred from hand to hand. Both suits were dismissed, the costs of the defendants who appeared and defended the suits to be borne by the plaintiffs.

In the written grounds of appeal, it is urged by Gobindmonee that the alienations by the widow Anundmoyee are not justified by any legal necessity; that her father was not indebted; that his estate, real and personal, was ample to meet any existing liabilities; that, in the face of the admission of the plaintiff's claim by Radha Madhub Chund, one of the defendants, and the absence of some of the other defendants, a decree should at all events have been passed against them.

The written grounds of appeal filed by the appellants Kalikoomar and Nundkoomar Chowdry are precisely similar to those urged by Gobindmonee.

The annexed genealogical tree will explain the position of the parties to these two suits:—



The first point pressed upon our attention in the oral argument of the learned pleaders for the respondents, raises a question of law. The point was taken by several of the defendants below, and is not noticed by the Principal Sudder Ameen. It is contended that, as the two plaintiffs Kalikoomar and Nundkoomar (appellants in No. 84) were born after the death of their maternal uncle Issurchunder, they would not, under any circumstances, inherit his estate, and that therefore they are not in a position to question the alienations made by his widow Chundermonee.

No witnesses have been examined to prove when the birth of the two plaintiffs took place, whether before or after the death of their maternal uncle Issurchunder. But, be this fact as it may, we are satisfied that, when the right of succession opened out, the nephews (sister's sons) of Issur Chunder Bose were alive. The right of succession did not accrue to the nephews until the death of Chundermonee, the widow of Issur Chunder Bose, who had a preferable title. We must therefore look to the state of the family when the widow Chundermonee died, and not when Issur Chunder Bose died; and it is not disputed that the two plaintiffs Kalikoomar and Nundkoomar were alive when the widow Chundermonee died. For the above reason

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we hold that the two plaintiffs are in a position to sue to question the validity of the alienations made by Chundermonee (*see* Vya Vashta Durpana, p. 137 ; Macnaghten's Hindoo Law, Vol. 1, pages 26 and 27).

* * * * * * *

It will be seen that, with a few exceptions, we have affirmed the decision of the Lower Court. With reference to the alienations which have been set aside as invalid, we have been asked to remove the widow Anundmoyee, defendant in suit No. 8, appeal No. 79, and her vendors,—the former from her possession of the estate of her husband, and the latter from the possession of the properties purchased by them from the widow—and to place the plaintiff Gungamonee in immediate possession. But we are of opinion that the plaintiff in No. 8 has failed to prove such a clear case of waste against the widow Anundmoyee as would justify so severe a measure. The alienations made by the widow Anundmoyee, which have been declared to be invalid, as made for purposes not justified by the Hindoo Law, are held to be not binding as against the reversioner Gungamonee the plaintiff in suit No. 8, but to be binding against the widow Anundmoyee, and to enure for her life. The question of whether the alienation of a Hindoo widow for purposes not justified by any such necessity as is held to be legal under the Hindoo Law is binding as against the widow, was referred by us to a Full Bench of Judges who have decided* that it is binding. We have therefore been guided by that decision, and the pleaders in this case were heard before that Bench. We may remark that there is a decision quoted in Macpherson on Mortgages, 3rd edition, p. 27 (Golukmonee Dabee *versus* Degumber Dey) in which the Court said "that the "law presumed neither against nor in favor "of an alienation by a Hindoo widow, and "that still less should presumption against "the validity of the alienation be made where "possession has gone along with it for a "long time, and a dormant title is asserted "against a purchaser for value." But the same Court, in the case of Casseenath Bysack *versus* Hursoondree Dassee which is a leading case, said "that the widow "has a qualified power to dispose of her "husband's estate, the limits of which "it is difficult, if not impossible, to define "further than by saying that the propriety "of any particular exercise of that power "must depend upon the circumstances "under which it is made, and must be con-"sistent with the general principles of the "Hindoo Law regarding such dispositions," and suits by reversionary heirs to restrain waste by the widow have been entertained by the said Court.

The current of decisions of the late Sudder Court, as well as of the Privy Council, has been to the effect that, though a purchaser for value is not bound to prove the antecedent economy or good conduct of the widow who alienates a portion of her husband's estate, or to account for the due appropriation of the purchase-money, he is bound to use due diligence in ascertaining that there is some legal necessity for the loan, and he may be reasonably expected to prove the circumstances connected with his own particular loan. The purchasers in the case before us are setting up sales in their favor made by a party whose title to alienate they must necessarily have known to be limited and qualified, and they may therefore reasonably be expected to prove the needs of the estate and the motives influencing the transaction.

* * * * * * *

* *See* Sutherland's Full Bench Rulings, p. 165.

The 7th April 1864.

Present :

The Hon'ble G. Loch and C Steer, *Judges.*

Adoption.

Case No. 145 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 23rd May 1861.

Tincourie Chatterjee (Plaintiff) *Appellant,*

versus

Denonath Banerjee and others (Defendants) *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

Baboos Dwarkanath Mitter and *Cally Mohun Doss* for Respondents.

Where a Hindoo lady adopted a son in the life-time of her husband, and carried on a law-suit during his life-time calling herself his wife and the mother of the adopted son, and neither the husband nor any one else denied the adoption, this circumstance was held to be strong corroborative evidence that the adoption was made not

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only with the husband's consent, but that the ceremonies usual on the occasion of an adoption were done in his actual presence.

Steer, J.—THE decision of a matter of fact will suffice for the disposal of this case. Was Opender Narain Mookerjee adopted by Nobongo Munjooree Dabee by and with the consent of her husband, Ram Comul Mookerjee, is the question on which this case rests?

It is established by the evidence on both sides that Nobongo Munjooree and her husband died within the same ten days. It is not disputed that Nobongo died in the end of October 1854; therefore it is clear that Ram Comul was alive in October 1854. The records show that in July 1854 Nobongo carried on a law suit calling herself the wife of Ram Comul, and the mother of Opender Narain, her adopted son. This was done during the life-time of her husband, and inasmuch as neither he nor any one else denied the adoption, this circumstance lends great corroboration to the oral evidence on the part of the plaintiff that Opender Narain was adopted, not only with the consent of Ram Comul, the husband of the adopting mother, but that the ceremonies usual on the occasion of an adoption were done in his actual presence.

We therefore think that the plaintiff was entitled upon this evidence to a decree, and we accordingly decree the suit in his favor with costs and interest in reversal of the judgment of the Lower Court.

The 7th April 1864.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Lakheraj (Resumption of—by Talookdars).

Case No. 461 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 22nd April 1863.

Gopal Chunder Roy and others (Plaintiffs) *Appellants,*

versus

Oodhub Chunder Mullick and others (Defendants) *Respondents.*

Baboo Poorno Chunder Mookerjee for Appellants.

Baboos Kishen Kishore Ghose and *Kedarnath Mozoomdar* for Respondents.

Talookdars have no legal right to sue for resumption of areas containing more then 100 beegahs of land.

Glover, J.—THE appellants in this case sued for the resumption of 150½ beegahs of land situate in different parts of Mouzah Matipoor, on the ground that the respondents held it on an invalid title.

The respondents took several *in limine* objections, the principal of which was that talookdars were not legally qualified to sue for the resumption of more than 100 beegahs; and on the merits declared the property to be valid lakheraj held by their ancestors from before the year 1790 A. D.

The Principal Sudder Ameen dismissed the suit on the issue in bar, and held that appellants as talookdars were not competent to sue. He quoted the precedent of the late Sudder Court dated 26th May 1860.

It is urged in appeal that, as the lands in question were not covered by one sunnud, and were, moreover, in several detached plots, all less than 100 beegahs, supported by separate "taedads," the principle of the above mentioned precedent did not apply.

We see no reason to disturb the judgment passed by the Lower Court in this case. With regard to the appellant's objection that the lands in suit are not covered by one sunnud, we observe that the precedents of this Court nowhere lay it down that the area must be included in one grant, and as the appellant never urged the objection in the Court of first instance, but sued for the whole 150½ beegahs in a lump without specification of any kind, we think it unnecessary to consider the question now. The fact of the lands being in several detached plots is no objection at all, as Sections 6 and 7 Regulation XIX of 1793 make special provision for the point.

There is another and a later precedent than that quoted above, *viz.* December 21st, 1863, and in accordance with that, and indeed with the general rule of law enunciated by this Court in many similar cases, we think that the appellants as talookdars have no legal right to sue for areas containing more than 100 beegahs. If, as they state, the respondents each hold plots of invalid lakheraj land less than 100 beegahs under separate grants, they have their remedy against them by proceeding in the usual way.

Appeal dismissed with costs.

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The 7th April 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Mortgage—Interest.

Case No. 2029 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 30th March 1863, reversing a decision of the Sudder Ameen of that District, dated the 25th July 1862.

Radhanath Sein (Plaintiff) *Appellant,*

versus

Bungo Chunder Sein (Defendant) *Respondent.*

Baboo Sreenath Sein for Appellant.

Baboo Debender Narain Bose for Respondent.

Where a deed of mortgage is silent as to interest, payment of the bare principal within the year of grace is sufficient to bar foreclosure.

Steer, J.—THIS is a suit to obtain possession upon foreclosure of a mortgage.

The Principal Sudder Ameen has held, in opposition to the view of the first Court, that there was no stipulation to pay interest upon the loan, and that as before the year of grace the principal of the loan was deposited in Court. the defendant has not lost his right of redemption. He accordingly dismissed the suit.

It is urged in special appeal that, though there was no stipulation for interest in the mortgage bond, it is clear from the answer of the defendant that possession was to have been given to him in lieu of any interest, and as he has not had possession given to him, it is only equitable that he should be allowed interest in consideration and satisfaction of which possession was to have been given.

We are of opinion that, where the deed of mortgage is silent as to interest, payment of the bare principal within the year of grace is sufficient to bar foreclosure. It may be that the fact stated by the special appellant may constitute a valid ground of action for recovery of interest from the defendant, but if interest was not a part of the agreement, the plaintiff is not entitled to have a declaration in this suit that the mortgage has been foreclosed, and the sale rendered absolute by the failure of the defendant to deposit interest, as well as the principal within the year of grace. There are two decisions on this point in support of this view—N. W. P. Vol. 8, p. 441, and S. D. A. 1859, p. 144.

In this view we uphold the judgment of the Lower Court, and dismiss the special appeal with costs.

The 8th April 1864.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Endowed property—Lease by Sevait.

Case No. 353 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 11th April 1863.

Prosunno Moyee Dossee and Kumud Kaminee Dossee (Defendants) *Appellants,*

versus

Koonjo Beharee Chowdhree and others (Plaintiffs) *Respondents.*

Baboo Dwarkanath Mitter for Appellants.

Mr. R. T. Allan and *Baboos Sreenath Doss* and *Anund Gopal Paulit* for Respondents.

A sevait is in the position of trustee for the founder and cannot create permanent encumbrances to the injury of the endowed property. No prescription derived from the trustee can in such cases run against the heirs and representatives of the founder.

Seton-Karr, J.—THE ancestor of the plaintiff created an endowment for the service of an idol, Ishwar Radhagobind Ji, and appointed one Gopeenath Gossain as sevait thereof. In the deed of appointment there was an express stipulation, drawn out in the clearest and fullest language, to restrain the sevait from alienating the property, or from creating any permanent encumbrances thereon. Notwithstanding this prohibition, the defendants alleged that the Gossain had created a mokururee of the property in favor of Nityanund Rai, from whom the defendants, appellants, acquired it by purchase.

The Lower Court, at the suit of the plaintiff to that effect, has set aside the alleged mokururee, and has decreed to the plaintiff, as heir of the original founder, khas possession of the property; and in appeal the question is narrowed to the claim of the purchasers of the mokururee to be allowed to remain in possession, even though it is admitted for them that no mokururee deed is or can be produced.

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It is argued that the Gossains admit that the original sevait did allow Nityanund ostensible possession as mokururreedar; and that at any rate the appellants, purchasers of the mokururee in 1240, have been in possession ever since, and cannot be ousted, but should be treated as any other tenant with long and unquestioned possession.

But the law of tenant and any right to be acquired under Act X of 1859 cannot be pleaded in this case. The plaintiff never admitted the defendants as his tenants, nor, as such, did he seek to eject them, nor was this plea ever urged in the Lower Court.

He sued the defendants as setting up a false and collusive title; and when the defendants are unable to produce or prove the document in Court, they are left simply in the position of mere trespassers without any right.

Besides, there are several other grounds on which the defendants ought to be removed and the decision supported.

The endowment and the deed appointing a sevait clearly contained an express provision against the creation of any such encumbrance as is now the basis of the defendants' claim. If their vendor ever had possession of the property, he had such possession with knowledge of the restriction in that deed, and he could never look to retain any lease or possession of the whole talook beyond the term of the life of the Gossain from whom he derived what he had.

Moreover, we think that, even in the absence of any such special restriction, it might well be argued for the plaintiff that a sevait is in the position of trustee for the founder, and could not create permanent encumbrances to the injury of the endowed property; and also that, in conformity with the tenor of decisions of the late Sudder Court, no prescription derived from the trustee could in such cases run against the heirs and representatives of the founder.

Thus, under any view of the case as above expressed, we are clear that the defendants can show no ground even for being retained in possession as tenants of the whole property, and we confirm the decision of the Principal Sudder Ameen, which treated the alleged pottah as non-existent at any time, and dismiss this appeal with costs.

The 8th April 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Mesne Profits.

Case No. 2055 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 8th May 1863, *reversing a decree of the Moonsiff of the District, dated the 24th September* 1862.

Wooma Churn Nundy (Plaintiff) *Appellant,*

versus

Goomani and others (Defendants) *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Debendur Narain Bose for Respondents.

A decree for possession does not, as a general rule, carry wasilat with it.

Kemp, J.—THE appeal is on the point of wasilat alone. It is contended that, as the special appellant has succeeded in obtaining a decree for possession, he is, as a necessary concomitant of such award, entitled to wasilat. This, as a fixed rule, we cannot admit, for it may be that a plaintiff, in suing for possession, has been guilty of such *laches* as to deprive him of wasilat. But in this case the Lower Court withholds wasilat on the ground that the cattle of other parties, as well as of the wrong-doer, have grazed on the disputed land which appears to be pasturage land; and that, therefore, the defendant is not liable. That reasoning is obviously wrong. We therefore remand the case that the Lower Court may decide what amount of wasilat is due to the special appellant. In arriving at this conclusion, the Lower Court will consider any plea the defendant may urge as to local usage as based on rights of pasturage common to the village.

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The 9th April 1864.

Present:

The Hon'ble Sir Barnes Peacock, *Kt. Chief Justice,* and the Hon'ble Shumboonath Pundit, *Judge.*

Mortgage — Decree of Supreme Court — Limitation—Pendency of litigation.

Regular Appeals from decisions passed by the Officiating Judge of Jessore, dated the 30th August 1862.

Case No. 589 of 1862.

Huro Chunder Biswas, Agent of Bhuggobutty Dassee, widow of Surroop Chunder Sircar, deceased, (Plaintiff) *Appellant,*

versus

Nobo Kissen Mookerjee and others (Defendants) *Respondents.*

Baboo Mohendro Lall Shome for Appellant.

Mr. C Gregory and *Baboos Unnoda Persad Banerjee* and *Banee Madhub Banerjee* for Respondents.

Case No. 590 of 1862.

Huro Chunder Biswas, Agent of Bhuggobutty Dassee, widow of Surroop Chunder Sircar deceased (one of the Defendants) *Appellant.*

versus

Sukheemonee Debea (Plaintiff) and Nobo Kissen Mookerjee and others (Defendants) *Respondents.*

Baboo Mohendro Lall Shome for Appellant.

Mr. C. Gregory and *Baboos Unnoda Persad Banerjee* and *Banee Madhub Banerjee* for Respondents.

Case No. 606 of 1862.

Nobo Kissen Mookerjee and others (Defendants) *Appellants,*

versus

Sukheemonee Debea (Plaintiff) and Denonath Banerjee and others (Defendants) *Respondents.*

Baboo Banee Madhub Banerjee for Appellants.

Mr. C. Gregory and *Baboo Unnoda Persad Banerjee* for Respondents.

A decree of the Supreme Court cannot be impeached in a suit brought in the Zillah Court to recover possession of mortgaged property.

Pendency of litigation is a sufficient reason to save limitation.

Peacock, C. J.—THE judgment of the Lower Court was given in suits Nos. 86 of 1859 and 41 of 1861. The suit No. 86 of 1859 on which this appeal was preferred was brought for khas possession of a 12 annas share of 54 mouzahs.

The plaintiff claimed as mortgagee of the 12 annas share, and alleged that Gunesham Mookerjee, father-in-law of the defendant Sukheemonee on the 20th Cheyt 1206, purchased the mouzahs in dispute with his own funds in the ostensible name of his brother Rashanund Mookerjee; that on the 29th May 1824, corresponding with the 17th Jyte 1231, Gunesham borrowed the sum of 55,000 sicca Rs. from the plaintiff, and mortgaged to her in the name of her brother Pittumber Koondoo the 12 annas share in question; that the mortgage was subsequently foreclosed, and that she is entitled to possession.

The defendants (the Mookerjees) are the representatives of Goluck Chunder, Gunesham's brother, and the defendant Sukheemonee Debea is the widow and heiress of Haradhun Mookerjee, the adopted son of Gunesham The other defendants claim through Goluck Chunder and his heirs.

No evidence was given to prove that Gunesham was solely entitled to the property, but on the contrary a decree of the late Sudder Court was proved in which it was decided on a suit brought by Haradhun, the adopted son, against Goluck Chunder Mookerjee, Rashanund Mookerjee, and others, that the property belonged to Gunesham and Goluck Chunder, and was held by them in equal shares. Indeed it was not contended on the part of the plaintiff that she is entitled to more than an eight annas share of the property as against such of the defendants as claim through Goluck Chunder.

The Judge in the Lower Court held that the mortgage was fraudulent and collusive, and dismissed the plaintiff's suit.

From this decision the plaintiff has appealed.

After the death of Gunesham, there were 4 claimants :—1*st*, the plaintiff as mortgagee under the mortgage of the 29th May 1824; 2*nd*, Debnath Banerjee, who claimed a 4 annas share under a sale by Gunesham of the 5th Bysack 1231, corresponding with April 1824; 3*rd*, the guardian of Haradhun who claimed in his behalf as the adopted son of Gunesham; and 4*th*, Goluck Chunder, the brother of Gunesham, who disputed the

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adoption and alleged that the property had been acquired by him and his brother Gunesham jointly, and that his brother had, previously to his death, conveyed the whole of the property to him by hibbanamah, or deed of gift, dated 30th January 1825.

Proceedings were taken in the Fouzdaree Court by Goluck Chunder, and judgment was given therein that the question of adoption was cognizable by the Civil Court, and that Goluck Chunder and Gunesham having been joint in food, Goluck Chunder was to be retained in possession. This order of the Magistrate was passed on the 23rd May 1825. On the 27th October 1825, the guardians of Haradhun commenced a suit No. 22 of that year against Goluck Chunder for a 12 annas share of the property, and Debnath Banerjee filed a suit against Goluck Chunder's sons and the guardians of Haradhun for the 4 annas share claimed to have been purchased by him from Gunesh. It is alleged by the plaintiff that that suit was brought at the instance of Haradhun's guardians; but whether it was so or not, is not very material in this case.

On the 17th February 1831, the suit No. 22 brought by Haradhun's guardians against Goluck Chunder was dismissed. Haradhun's guardians appealed to the Sudder Court who, on the 25th April 1834, dismissed the appeal and affirmed the decision. On the 1st February 1833, the plaintiff commenced a suit in the Supreme Court in the name of her brother Pittumber Koondoo against the guardians of Haradhun and another for the foreclosure of her mortgage of the 29th May 1824, and obtained a decree in that suit in the year 1834. Execution being sued out in that suit, Goluck Chunder's sons objected to the possession being delivered to the plaintiff under that execution upon the ground that they were in possession on their own account, and that the adoption of Haradhun had been set aside by the decree in the suit No. 22 of 1825, and which had been affirmed in appeal as above mentioned, and possession was refused.

Haradhun Mookerjee appealed to the Privy Council against the decision of the Sudder Court in that suit preferred by his guardians. The plaintiff in this suit, Bhuggobuttee Dossee, filed a bill in the Supreme Court by way of revivor and supplement to the suit commenced on her behalf by Pittumber Koondoo against the defendant Sukheemonee Debea, as the widow and heiress of Haradhun, and against Sreemutty Saroda Soondery Dossee and Sreemutty Bidyasoondery Dossee, as the representatives of Pittumber Koondoo; and on the 27th February 1856, a decree was passed by the Supreme Court, in the original foreclosure suit of Pittumber Koondoo, and in the suit brought by the plaintiff by way of revivor and supplement, by which it was declared that the plaintiff was entitled to stand for all purposes connected with the mortgage in the place of Pittumber Koondoo, and was entitled to the full benefit of the proceedings in the original suit and of the decree for foreclosure made therein; and it was further declared that the defendants Bidyasoondery Dossee and Saroda Soondery Dossee should convey and assign the said mortgage premises to the plaintiff; and further that the defendant Sukheemonee Debea, as the widow, heiress, and sole legal personal representative of Haradhun, should deliver over to the said complainant the possession of the said premises comprised in the said mortgage and in the decree in the original suit, namely, the 12 annas share in the 54 mouzahs, and should execute a conveyance of the same, and in case of difference as to the conveyance (and not as stated by the Judge of the Lower Court as to the quantity of land to be delivered) the same was to be settled by the Master.

The suit brought by Debnath Banerjee for the 4 annas share was decided against him on the 7th December 1840, and the decision was confirmed in appeal by the Sudder Court on the 30th December 1842.

The appeal preferred by Haradhun was decided by the Privy Council in his favor in February 1849. The alleged hibbanamah from Gunesham to Goluck Chunder of January 1825 was held to be a forgery, and it was declared that the title of Haradhun, as the adopted son of Gunesham, was made out, and the case was ordered to be remitted to the Lower Court with that declaration and direction to give effect to the appellant's claims in that suit which might be consequential on that declaration. The case is reported in 4 Moore's Indian Appeals, page 414.

The case was afterwards heard before the Sudder Court upon appeal from the decision of the Principal Sudder Ameen, to whom it had been referred by the Sudder Court, in pursuance of the direction of the Privy Council, and it was finally decided on the 31st March 1857 that the property was the joint property of Gunesham and Goluck Chunder, and that the plaintiffs in that suit

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were entitled to recover a 4 annas share of the property and mesne profits from the time of its commencement.

The Principal Sudder Ameen, considering that the property belonged to Gunesham and Goluck Chunder, jointly awarded the plaintiffs a 6 anna share, half of the 12 annas share claimed in the suit; but the Sudder Court altered that decision, considering that the plaintiff having admitted that a 4 anna share had been conveyed away by Gunesham, the plaintiffs, as representing him, could not be entitled to more than the remaining 4 annas of his 8 annas share.

It appears, then, that the plaintiff in this suit, in the name of Pittumber Koondoo, obtained a decree in the late Supreme Court in the year 1834, establishing the mortgage deed of May 1824; that in 1836 she obtained a decree against the defendant Sukheemonee Debea entitling her to the full benefit of the decree in the original suit, and ordering the defendant Sukheemonee as the widow, heiress, and sole legal personal representative of Haradhun Mookerjee, to deliver over to the plaintiff the possession of the said premises, and to execute a conveyance of the same to her. Neither in the original suit in the Supreme Court, nor in the supplemental suit, was any attempt made either on the part of the guardians of Haradhun, or of the defendant Sukheemonee, to show that the mortgage deed was fraudulent; nor has she in the present suit made any such allegation. The imputation that the mortgage deed was fraudulent appears to have occurred to the Judge for the first time. In our opinion, if that deed was fraudulent, Goluck Chunder was not the author of the fraud, but the decree of the Supreme Court cannot be impeached in this suit.

The plaintiff commenced her suit for foreclosure of Gunesham's property against the proper parties, for it turns out now by the decision of the Privy Council that Haradhun was the adopted son and heir of Gunesham. The defendant Sukheemonee Dossee, Haradhun's widow, is entitled, by virtue of the decree of the Privy Council and the subsequent decree of the Sudder Court in 1857, to recover against Goluck Chunder's representatives possession of 4 annas of Gunesham's 8 annas share of the property. The plaintiff is entitled to recover against Sukheemonee under her decrees in the Supreme Court, and Sukheemonee is entitled under the decree obtained in 1857 to a 4 annas share as against the representatives of Goluck Chunder. The plaintiff in this suit seeks to enforce as against Sukheemonee and Goluck Chunder's representatives her rights under the decrees of the Supreme Court. We think that she is clearly entitled in equity to recover from Goluck Chunder's representatives, who now hold it, the 4 anna share, from which Sukheemonee would have been entitled to turn them out under her decree in the absence of the plaintiff's decrees against her deceased husband and herself as his heiress and representative.

If the mortgage was fraudulent, as found by the Judge, Haradhun and Sukheemonee should have set up that defence in the suits in the Supreme Court. If they were ignorant of their rights, and the decrees in those suits were obtained against them fraudulently, they should have sued to set aside the decrees; but, as long as those decrees are unimpeached, effect must be given to them.

It is said that the plaintiff is barred by limitation. We think that she is not so far as the 4 anna share decreed to Sukheemonee in 1857 is concerned, but that she is barred as to the remainder of the 8 anna share of Gunesham. We have shown that the plaintiff commenced her suit for foreclosure against the proper party. But that party was not in possession, and under the decree against him, she could not turn out Goluck Chunder's heirs who were in possession.

Haradhun had at that time a suit pending against Goluck Chunder's heirs, and the plaintiff had a right at her own risk to wait until the determination of that suit, in order that she might avail herself of whatever decree he might recover. But she had no right to wait for the purpose of ascertaining how the points in dispute between Haradhun and Goluck Chunder might be determined, for the same points would not have arisen in any suit commenced by her against Goluck Chunder as were raised in the suit between Haradhun and Goluck Chunder; for as her mortgage was obtained from Gunesham, it was immaterial whether Haradhun was or was not his adopted son; and, as it was of a date prior to that of the hibbanamah set up by Goluck Chunder, it would have been immaterial whether it was or was not genuine.

The first suit for foreclosure was brought on the 1st February 1833, and a decree obtained in it in 1834. The suit No. 22 of 1825 was then depending, or rather the appeal to the Sudder Court preferred in that suit. The appeal from the Sudder Court to the Privy Council was not finally determined until 1849, and the plaintiff was not bound

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to commence her suit until that time, even if she was bound to commence it before the final decision of the Sudder Court in 1857. It is unnecessary to determine this latter point, for, as this suit was commenced on the 30th June 1859, it was commenced within 12 years from the date of the decree of the Privy Council. Rajah Ennyet Hossein *vs.* Syud Ahmed Reza, 7 Moore's Indian Appeals, 238. Prannath Roy Chowdhry *vs.* Rookee Begum, idem 323, are authorities bearing upon the point of limitation.

Therefore, as against the representatives of Goluck Chunder and those who claim under them, she will be entitled to a decree for a 4 anna share only.

The decree of the Lower Court must be reversed. The plaintiff must have a decree for a 4 anna share with wasilat from the date of the institution of the suit, to be ascertained in execution, with interest thereon at 12 per cent. from the date of the amount's being so fixed, with costs of suit in the Court below, to be ascertained by the Court, in proportion to the amount recovered by the plaintiff. But as Sukheemonee was only a formal party, those costs are given against the other defendants only.

As the question of the mortgages having been obtained by fraud was raised by the Judge, we think that the defendant Sukheemonee ought not to pay the costs of this appeal. But as litigation was caused by Goluck Chunder and his heirs setting up a forged hibbanamah, and retaining possession under that document, they and the other respondents who claim under them, must pay the costs of this appeal in proportion to the amount recovered by the plaintiff; and we think that they ought not to recover their costs of suit in the Lower Court or of this appeal to the extent of that portion of the plaintiff's claim which has been disallowed.

The costs of suit and of this appeal as above awarded, will carry interest at 12 per cent. from this date to the date of realization.

As to the suit No. 41 of 1861 and the appeals Nos. 590 and 606 arising out of it.

The suit was brought by Sukheemonee to recover possession of the 4 anna share decreed her in 1857, and also the 4 anna share of Gunesham's 8 annas not included in that suit upon the ground of the supposed sale to Debnath.

The Judge, we think, was right in decreeing the last named 4 anna share to the plaintiff Sukheemonee; but as Bhuggobuttee has been decreed by our judgment to be entitled to the 4 anna share decreed to Sukheemonee in 1857, the plaintiff in this suit cannot recover that share.

There will, therefore, be a decree for the plaintiff for a 4 anna share only, with wasilat from date of plaint, the amount to be ascertained in execution. The wasilat to carry interest at 12 per cent. from the date of the amounts being fixed.

The plaintiff will recover costs in the Court below in proportion to what she has recovered against all the defendants, except Bhuggobuttee who was merely a nominal defendant in this suit. The plaintiff will also recover against the appellant in appeal No. 606, costs in the same proportion with interest at 12 per cent. from this date. No costs, however, are to be allowed on any account to any of the defendants either in the Court below or in this Court. No costs to either party in appeal No. 590.

The 12th April 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Jurisdiction—Plaint.

Case No. 541 of 1863.

Regular Appeal from a decision passed by the Judge of West Burdwan, dated the 31st August 1863.

Maharajah Dheeraj Mahtab Chunder Bahadoor (Plaintiff) *Appellant,*

versus

Damoodur Singh and others (Defendants) *Respondents.*

Baboos Juggodanund Mookerjee, Chunder Madhub Ghose, and *Moonshee Ameer Ali* for Appellant.

Baboo Kishen Sukha Mookerjee for Respondents.

A plaint valued at 1,000 Rs. instead of being filed in the Sudder Ameen's Court, was registered by mistake in the Judge's Court, where it was dismissed for want of jurisdiction,—HELD that the Judge was right in dismissing the suit, but that he should have noticed the defect of jurisdiction at the time of presenting the plaint, and that, instead of registering the plaint, he should have returned it for presentation to the Court having jurisdiction to try the suit.

Morgan, J.—PLAINTIFF filed his plaint in this case valued at 1,000 rupees before the Zillah Judge of West Burdwan, and the Court dismissed the case on the ground that, under Section 6 Act VIII of 1859, the suit should have been filed in the Court of the

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Sudder Ameen. Against this decision the plaintiff has appealed to this Court, and urges that he had filed his plaint in the Court of the Zillah Judge under a misapprehension that, from the nature of the suit, he was required to sue only in *that* Court.

There is nothing in the nature of the case which can justify the plaintiff in filing his plaint in the Court of the Zillah Judge, and not in the lowest Court (the Sudder Ameen's) competent to try the same with reference to the valuation of the case. While Section 6 of Act VIII of 1859 distinctly provides that all actions should be brought in the lowest Court competent to try them, no Section of the law directly applies to a case in which, by mistake, the plaint is filed in a higher Court than the one competent to try it. Sections 29, 30, and 31 provide for rejecting or returning plaints in certain cases, but these Sections do not apply to this case. The Judge was right in dismissing the case, as the plaint should have been filed in the Court of the Sudder Ameen.

This defect of jurisdiction (which the plaint itself disclosed) should have been noticed at the time of presenting the plaint, and the Court, instead of registering the plaint, should have returned it for presentation to the Court having jurisdiction to try the suit. The plaint having been registered, written statements were filed, and on the day fixed for the settlement of the issues, the Court framed an issue raising the question of jurisdiction, and disposed of the suit by a decree of dismissal for want of jurisdiction.

This decree was right, and must be affirmed, but the defect of jurisdiction should, in this case, have been observed at an earlier stage of the suit.

We dismiss the appeal with costs.

The 12th April 1864.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Res judicata.

Case No. 2255 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 16th May 1863, reversing a decision passed by the Moonsiff of that District, dated the 9th May 1862.

Gunga Narain Dass and others (Plaintiffs) *Appellants,*

versus

Punchanunee Dassee and others (Defendants) *Respondents.*

Mr. R. E. Twidale for Appellants.

Mr. C. Gregory for Respondents.

A case struck off on the ground of discrepancy between the plaint and the plaintiff's deposition cannot operate as a *res judicata.*

Glover, J.—SPECIAL appellant urges that the Lower Court was wrong in holding the present suit barred, inasmuch as there never has been any decision regarding it passed on the merits.

We find from the record that, when Koylas Chunder preferred a similar case, he was examined as a witness and deposed contrary to the facts mentioned in his plaint, explaining the discrepancy by denying that he had anything to do with instituting this suit, and on this the Principal Sudder Ameen dismissed it.

We do not see in this case a second suit for the same object. In point of fact the former proceeding was no suit at all. There was no evidence taken, no orders passed, no decision come to on the merits. The case was struck off on the ground of discrepancy between the petitioner's plaint and his deposition.

We therefore decree this appeal and remand the case for decision on the merits.

The 12th April 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Section 246 Act VIII of 1859—Sale in execution of decree.—Possession—Title.

Case No. 2080 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 27th April 1863, reversing a decision passed by the Moonsiff of that District, dated the 11th January 1862.

Wooma Churn Chowdhry (Defendant) *Appellant,*

versus

Kurralee Churn Chowdhry and another (Plaintiffs) *Respondents.*

Baboo Bhoobun Mohun Roy for Appellant.

Baboo Kishen Sukka Mookerjee for Respondents.

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When land is attached for sale in execution of a decree, the point of possession is the one which determines its liability to sale or not under Section 216 Act VIII of 1859. But in a suit brought to set aside a sale made under that Section, it is not the mere possession but the actual right and title which determines whether the sale ought or ought not to stand.

Steer, J.—It has been found in this case that Baghut is not a benamee purchaser for the judgment-debtor, and the Lower Court accordingly set aside a sale of the land made upon the supposition that the land was the property of the judgment-debtor.

It is contended by the pleader for the special appellant that the point, benamee or not, is not material, and that the thing to look to was whether Baghut or the judgment-debtor is in actual possession.

When land is attached for the purpose of holding a sale of it in execution of a decree, the point of possession is the one which determines its liability to sale or not under Section 246 Act VIII of 1859. But in a suit brought to set aside a sale made under the above Section, it is not the mere possession but the actual right and title which determines whether the sale ought or ought not to stand. In the present case it has been found that the ostensible and the legal title is with Baghut, and that there is no evidence on the other side that the legal title is otherwise than the real and the *bonâ fide* title. As evidence of title, the point of possession is not without importance, but the view of the pleader for the special appellant that possession is the only point to consider in determining whether the sale in execution shall stand or not, is altogether erroneous. The objection raised against the judgment being then untenable, we declare the special appeal dismissed with costs.

The 13th April 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Summons on party required to produce documents.

Case No. 202 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dinagepore, dated the 15th January 1863.

Doorgamonee Dossee (Defendant) *Appellant,*

versus

Benode Monee Dossee (Plaintiff) *Respondent.*

Mr. G. C. Paul and *Baboo Kishendyal Roy* for Appellant.

Baboo Banee Madhub Banerjee for Respondent.

A written summons distinctly describing the nature of the documents required must be issued on a party to a suit required to produce documents. A verbal order to his pleader is not sufficient and is not such a summons as is contemplated by law.

Loch, J.—Plaintiff is the widow of Hookum Chund Shatar. The defendant is the widow of Juggernath Shatar, son of Oodoy Chund, brother of Hookum Chund.

Hookum Chund and Oodoy Chund lived in commensality and carried on business together. After the death of her husband, who demised subsequent to Oodoy Chund, the plaintiff remained in commensality with Juggernath, son of the said Oodoy Chund, till the time of his death, and then continued in joint possession with the defendant, widow of the said Juggernath, of all the property, real and personal. Subsequently, disputes arose between them, and the defendant being the stronger party, plaintiff was deprived of possession, and brings the present action to recover possession of the real property consisting of a house, &c., and of her husband's share in the whole of the personal property, *viz.* of the capital with which their joint trade was carried on.

The Principal Sudder Ameen gave plaintiff a decree both for the realty and personalty, fixing the latter at rupees 10,500, because the defendant, though called upon to produce her accounts, had failed to comply with the order of the Court.

An appeal is preferred from this decision by the defendant. She admits the right of the plaintiff to the half share, both of the realty and personalty, and acquiesces in the order regarding the former, but objects to the order regarding the latter, on the ground that the amount has been fixed arbitrarily, and not after due enquiry as to what are the real funds of the parties; and though, it is said, that she disobeyed the order of the Court, and that in consequence the Judge had no means of fixing the value of the personalty other than that he adopted, yet no summons was served upon her, nor was she legally required to produce her accounts.

On 27th January 1864, the appeal came up for the decision of this Court, and this Court, on the representation of the Counsel for the appellant, considered it advisable to send for and examine the summons which had been issued upon the appellant, and the return made to them.

From the return made by the Lower Court, it appears that no summons requiring the production of accounts was served on the

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appellant, but that her vakeel was required by the Principal Sudder Ameen to cause his client to produce the accounts. Now, the requisitions of the law on this point are very plain, and cannot be set aside by any Judge who may think some other mode of procedure more convenient or as effectual. Section 166 of Act VIII 1859 gives power to the Court to send for and examine any party to a suit, and to inspect any documents in his possession. In such cases the Court is required to issue a summons on the party. Section 152 shows what the summons is to contain if the witness be required to attend and give evidence, as well as produce documents—Section 153 what, if documents only are required to be produced. Section 154 and following show how a summons is to be served. If the pleader of a party to a suit have authority in writing filed in Court to make any application for appearance of such party, the summons to produce documents might, in the case of a female, be served upon him, a course prescribed in ordinary cases by Section 18 of the Code; but, under any circumstances, a written summons, describing in sufficiently distinct terms the nature of the documents required, must be issued, and a verbal order to the pleader is insufficient and is not such a summons as is contemplated by law. Under these circumstances, we reverse the decision of the Lower Court in regard to the personalty, and direct the Principal Sudder Ameen, after issuing a summons in the manner indicated above and examining the accounts of the defendant, if produced, to determine the amount of personalty to which the plaintiff has a right.

The 15th April 1864.

Present:

The Hon'ble C. B. Trevor and A. T. T. Peterson, *Judges.*

Market (Profits of)—Rent.

Case No. 1761 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 19th March 1863, modifying a decision passed by the Moonsiff of that District, dated the 9th September 1861.

Denonath Roy (Defendant) *Appellant,*

versus

Gooroodoss Ghosal (Plaintiff) *Respondent.*

Mr. C. Gregory and *Baboo Greeja Sunkur Mozoomdar* for Appellant.

Baboos Kally Mohun Doss and *Mohinee Mohun Roy* for Respondent.

Where *A* permitted *B* to build a *haut* at his own expense on *A*'s land, it was held that *A* had impliedly admitted *B* as a tenant, and having so admitted him, was entitled as zemindar to rent for the land occupied by *B*, but not to the share of the profits of the *haut*.

Trevor, J.—In this case the plaintiff sued for a moiety of the land on which a *haut* stood, and for the whole proceeds arising from a market erected on his own and the defendant's lands at his own expense and with the leave and license of the defendant. The defendant admitted that plaintiff was entitled to a moiety of the land, but he denied plaintiff's claim to the whole of the proceeds of the *haut*, and he claimed a half of the proceeds of the *haut*, inasmuch as it was situated on his land. The Principal Sudder Ameen gave plaintiff a decree for the moiety of the land and for the entire proceeds of the *haut* during the period of his dispossession, inasmuch as the *haut* was built entirely at his own expense and with the leave and license of the defendant.

Defendant now appeals specially, urging that, as a moiety of the land sued for is his, he is entitled to half the proceeds of the *haut* standing upon his own land; that the permission to the plaintiff to build the *haut* on his land at his own expense did not deprive him of his right as zemindar to the profits of the *haut* standing on his own land; and that the Lower Appellate Court's decision should be modified, and plaintiff's decree should be limited to the profits of the *haut* standing on the land belonging to him.

We think that the contention of the defendant will not hold water, and that by permitting plaintiff to build a *haut* at his own expense on his, defendant's, lands, he has impliedly admitted the plaintiff as a tenant of his own, and having so admitted him, he is entitled as zemindar to rent from the plaintiff for the land occupied by him, but not to the share of the profits of the *haut*. This judgment does not and cannot in any way prejudice any right which the defendant may have to sue for rent from the plaintiff. The special appeal is dismissed without costs under the circumstances.

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The 19th April 1864.

Present:

The Hon'ble C. B. Trevor and F. A Glover. *Judges.*

Sale by Guardian of Minor—Necessity.

Case No. 1784 of 1863.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 1st April 1863, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 23rd September 1862.

Maha Beer Pershad Sing (Defendant) *Appellant.*

versus

Dumreeram Opadhya (Plaintiff) *Respondent.*

Mr. R. V. Doyne and *Baboos Kally Mohun Doss* and *Hem Chunder Banerjee* for Appellant.

Messrs. W. L. Mackenzie and *C. Gregory, Moonshee Ameer Ali,* and *Baboo Chunder Madhub Ghose* for Respondent.

Though the lender of money, borrowed by the guardian of a minor for the payment of a family debt, is bound to enquire into the necessity for the loan, and to satisfy himself as well as he can that the guardian is acting for the benefit of the estate, yet, if he does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably created necessity is not a condition precedent to the validity of his charge, and he is not, under such circumstances, bound to see to the application of his money.

Glover, J.—THE special respondent (plaintiff in the Court below) in this case sued to recover possession of Mouzah Toolfageepore, which he alleged to have been wrongfully alienated during his minority by his mother acting as his guardian.

Both the Lower Courts held that no necessity for the sale was proved, and that according to law such necessity must be shewn before alienation could be legal They therefore decreed special respondent's claim against the purchaser with mesne profits and interest.

We think that the Lower Appellate Court has taken too high a view of the special appellant's responsibility in this case. He is nowhere shown to have acted *malâ fide*, nor is it contended that, so far as he was concerned, the sale was unfair, or the price paid disproportionately small.

A lender, under the circumstances of a case like the present, is undoubtedly bound to enquire into the necessity for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the guardian is acting for the benefit of the estate. But if he does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably created necessity is not a condition precedent to the validity of his charge; and under such circumstances, he is not bound to see to the application of his money.

In the present case it is shown that the money advanced by special appellant was appropriated to the payment of a family debt, and the ruling of the Privy Council in the case of Hunooman Pershad Panday, dated 4th July 1856 (Moore's Reports, Vol. 6) applies.

The appeal is, therefore, decreed, and the case remanded to the Judge for further enquiry, with reference to the above remarks.

The 19th April 1864.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Building (on another's land) — Acquiescence.

Case No. 1795 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 23rd February 1863, modifying a decision passed by the Officiating Moonsiff of Pundooah, dated the 18th July 1862.

Hurrochunder Mookerjee (Defendant) *Appellant,*

versus

Hullodhur Mookerjee (Plaintiff) *Respondent.*

Baboo Romanath Bose for Appellant.

Baboo Nil Madhub Sein for Respondent.

If a person stands by and allows another to erect a *pucka* building on his land, he must be considered to have acquiesced in the act, and therefore cannot sue for the demolition of the building, but only for damages or for the rent of the land on which the building stands.

Trevor, J.—PLAINTIFF sued for the price of certain bricks and wood forcibly taken by the defendant, and for the demolition of a house built partly on his land.

The defendant pleaded that the wood and bricks are his property, and that the house is built on his own land.

The Lower Court found entirely in plaintiff's favor.

Defendant now appeals specially, urging 1st, that, as plaintiff stood by and saw the erection of the house on his land, he cannot now demolish it, but, under the precedent

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of 21st September 1858 (page 151) of decisions of that year, must sue for damages; and, 2*ndly*, that the Lower Court has not gone fully into the question as to the property in the brick and wood, nor applied the Law of Limitation as pleaded by him.

On the *second* point we see no ground for interfering with the decision of the Court. The point was not raised in the Lower Appellate Court, and so cannot be raised here.

On the *first* point we think there can be no doubt. If a person stands by and allows another, in this case a sharer, to build a *pucka* building on his land, he must be considered to have acquiesced in the act, and therefore he can only resort to an action for damages, or for the rent of the land on which the building stands. We, therefore, strike out so much of the Principal Sudder Ameen's decision as directs the demolition of the building raised by the defendant.

Both parties in this case will bear their own costs in special appeal.

The 19th April 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Jurisdiction.

Case No. 2693 of 1863.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 1st July 1863, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the 4th September* 1862.

Doorga Soonder Roy and others Defendants) *Appellants,*

versus

Jumoona Moye Debia (Plaintiff) *Respondent.*

Baboos Debendronarain Bose and *Gopal Lall Mitter* for Appellants.

Baboos Mohesh Chunder Chowdry and *Mohinee Mohun Roy* for Respondent.

There is nothing in law to prevent a Court, in a suit for money brought against defendants living within its jurisdiction, from enquiring into the proceeds of an estate situated beyond it, in order to fix the amount due to the plaintiff and payable by the defendants.

Shumboonath Pundit, J.—In this case defendants appeal against the decree of the Lower Appellate Court passed against them on the suit of the plaintiff, their sister, instituted in Zillah Rajshahye, for return of money appropriated by them during their management of her estate. Respondent also, under Section 348 of Act VIII of 1859, offers objections to certain items of deduction allowed by the Lower Court.

In the appeal of the defendants, we do not see any legal ground to interfere with the decision of the Lower Court. All sums which they were legally entitled to deduct have been deducted, and what they further ask to be deducted, has partly been already allowed to them, and the remainder is not, for the reasons given by the Lower Court, a proper deduction. Part of the property, the proceeds of which were the subject matter of investigation in the case, was situated in Rungpore; and the Lower Appellate Court, thinking that it could not legally empower an Ameen attached to it to make an enquiry regarding the proceeds of an estate situated beyond the latter district, has excluded the collections of the estate situated in Rungpore from calculation. With regard to this item, the objection of the respondent is clearly good. There is nothing in law to prevent the Rajshahye Court, in a suit for money brought against defendants living within its jurisdiction, from enquiring into the proceeds of an estate situated beyond it, in order to fix the amount due to the plaintiff and payable by the defendants. The appeal of the defendants is dismissed with costs, and the objections of the respondent decreed; and the decree of the Lower Court amended with costs to the extent of the money disallowed as the proceeds of the estate situated in the Rungpore District. The objection of the respondent to the extent that the decree of the Lower Appellate Court has been upheld beyond this amendment, is rejected with costs.

The 20th April 1864.

Present:

The Hon'ble F. B. Kemp and A. T. T. Peterson, *Judges.*

Res Judicata—Estoppel—Privity in estate.

Case No. 498 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 13th May 1863.

Munmohun Sing (Plaintiff) *Appellant,*

versus

Amritnath Chowdree and others (Defendants) *Respondents.*

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Baboos Dwarkanath Mitter, Banee Madhab Banerjee and *Romesh Chunder Mitter* for Appellant.

Mr. J. W. B. Money and *Baboo Ashootosh Dhur* for Respondents.

A decision in a former case in which a mere question as to the use of the water in a water-course arose, cannot operate as *res judicata* in a subsequent case in which the subject matter is whether the defendants have the right of throwing up an embankment and obstructing the water-way.

The effect of verdicts (whether upon parties or privies) must altogether depend on the question whether the same point was actually in issue in the former and present suits.

Kemp, J.—THIS was an action for the removal of a dam erected by the defendant in a "damad" or artificial channel used for purposes of irrigation. It is alleged that the defendants erected this dam on the 12th July 1858, and thus closed the channel and prevented the water from reaching Mouzahs Kulchatur and Neelatur, the estates of the plaintiff. The prayer of the plaint was that the dam be removed, and for confirmation of the plaintiff's right to keep the channel open according to a long standing custom, by reversal of the decision of the Sessions Judge of Bhaugulpore, dated the 4th May 1859. The suit was valued at Rs. 12,320-1-10, and was instituted on the 2nd May 1862.

The principal defendant, Amritnath Chowdry, raised a preliminary objection that the suit of the plaintiff was barred by Section 2 Act VIII of 1859, inasmuch as the former proprietors of Mouzahs Kulchatur and Neelatur, whose representative the plaintiff is brought a suit against Dwarkanath Ghose, the proprieter of Tuppah Soojanuggur, for the same cause of action, *viz.* to assert their right to use the water of the Raj Damad, and that this suit was dismissed for want of proof of such right by the Lower Court on the 29th March 1856.

It is unnecessary to notice the answer on the merits, as the suit was dismissed without entering upon them, on the ground that the suit being (to use the words of the Principal Sudder Ameen) "affected by Section 2 Act VIII of 1859, it must be at once dismissed without reference to the other circumstances of the case."

Dwarkanath Ghose, the proprietor of Tuppah Soojanuggur, answered briefly to the following effect :—That he had purchased a one anna share in Mouzahs Kulchatur and Neelatur ; that he had not taken out execution of the decree of the Sudder Court dated the 29th March 1856, according to which he has the exclusive right to use the water flowing through the Raj Damad ; and that he has no objection to the irrigation of the lands of the aforesaid Mouzahs Kulchatur and Neelatur with the water flowing through the Raj Damad.

In appeal, it is urged by Baboo Dwarkanath Mitter, the pleader for the appellant, that the judgment of the Principal Sudder Ameen must be reversed, and the suit remanded for trial on the merits, inasmuch as the plaintiff was neither a party nor a privy to the suit decided by the Sudder Court ; and, further, that the cause of action and subject matter of that suit were not identical with those of the present suit.

The learned Counsel, Mr. Money, on the other hand, contended that the subject matter of the present suit is identical with that of the suit decided by the Sudder Court on the 29th March 1856. That the channel through which the plaintiff claims to have the water to run into his villages is the same channel as was the subject of dispute in the former suit ; in short, that the plaint in this suit is the same in substance as that of the former suit, with a mere colorable variation.

We are clearly of opinion that the decision of the Principal Sudder Ameen is wrong, and that the suit must be remanded for trial on the merits, the evidence on the record not being sufficient to enable this Court to pronounce a satisfactory judgment.

The doctrine of "res adjudicata" must never be too widely construed, as great injustice may be done, if a Court refuses to entertain a suit which has not really been heard before (Macpherson's Civil Procedure, page 49).

The subject matter of the former litigation which terminated in the judgment of the late Sudder Court dated the 29th March 1856, was not the same as the subject matter of the present suit ; the parties were not the same ; the issues were not the same ; and the claim which is sought to be enforced in the present suit is quite distinct from the claim in the former suit.

On turning to the decision of the late Sudder Court dated the 29th March 1856, we find that there were two suits, one in which Dwarkanath Ghose, the proprietor of Tuppah Soojanuggur was plaintiff, and Mussamut Doorgamonee and others were defendants, and the other in which Mussamat Doorgamonee and others were plaintiffs, and Dwarkanath Ghose was defendant.

Dwarkanath Ghose sued for the confirmation of his right to the sole use of a water-

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course called the Raj Damad, and alleged that the respondents in that suit, the then proprietors of Mouzahs Kulchatur and Neelatur, had no right whatever to the use of the water. He admitted that, in excavating the said water-course, injury was done to the lands of Mouzah Malook, the property of the predecessor of the respondent in the present appeal; and that, in consideration of such injury, a user of the water for one day in the week was granted to him. The other suit was brought by certain ryots and farmers claiming the right to use the water.

The Sudder Court decided that the water-course, the subject of dispute in those suits, was an artificial construction excavated by the ancestors of Dwarkanath Ghose, and flowing almost exclusively through his estate of Tuppah Soojanuggur; that, such being the case, the Court could not presume that any other party had a right to the use of the water of that water-course; that the proprietors of Mouzahs Kulchatur and Neelatur had failed to prove that they had ever enjoyed the use of the water for the purpose of irrigating those villages; and that the exclusive right of the water-course then in dispute, with the exception which had been made by him in favor of Boloram Chowdree, vested in Dwarkanath Ghose. The result of the decision of the Court was that the suit of the farmers and ryots of Kulchatur and Neelatur was dismissed, and the suit of Dwarkanath Ghose was decreed, and he was declared to have a title to the exclusive use of the water-course which flows through his zemindaree of Soojanuggur.

Now, it is clear that the subject matter of these suits is not identical with the subject matter of the present suit. In the former suits, a mere question of the use of the water arose; in this suit the subject matter is whether the defendants have a right to throw up an embankment and obstruct the water-way. The learned Counsel for the respondent contends that his client is privy in estate with the proprietor of Soojanuggur; and, as the former suit was between the maliks of Soojanuggur and the maliks of Kulchatur and Neelatur whom the plaintiff represents, the plaintiff is estopped by the decision of the Sudder Court. The Counsel cited Smith's Leading Cases, Doe *vs.* Oliver, Vol. 2, pages 442-443; and Blakemore *vs.* The Glamorgan Canal Company, 2 C. M. and R., page 133; Street *vs.* Broddington, 5 Espinasse page 56.

We observe that this plea was not raised in the Lower Court, but we are of opinion that there is no force in this argument, and that the cases quoted by the learned Counsel are not applicable to the case before us; for the effect of verdicts whether upon parties or privies must altogether depend on the question whether the same point was actually in issue. The defendant in this suit may be entitled to the use of the water for 24 hours in the week by grant from the proprietor of Soojanuggur, but that would not give him a right to put up an embankment, and thus obstruct the water-course. The plaintiff sues for the removal of this embankment, and it may be that the removal would cause injury to the defendant's easement, and on the merits this question will be worthy of consideration; but it is clear that the doctrine of privity in estate with the proprietor of Soojanuggur will not extend to an independent act such as forms the cause of action in the present suit. The learned Counsel and his co-pleader admit that there is no evidence on the record to establish the identity of the "bund" in dispute in this suit with the locality in dispute in the former suit. We, therefore, reverse the judgment of the Principal Sudder Ameen, and remand this suit for trial on the merits. Costs to follow the result.

The 21st April 1864.

Present:

The Hon'ble F. B. Kemp and A. T. T. Peterson, *Judges.*

Onus probandi—Joint Hindoo Family—Allegation of separate property—Interest.

Case No. 519 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of 24-Pergunnahs, dated the 19th August 1863.

Prannath Chowdhry (Defendant) *Appellant,*

versus

Kashinath Roy Chowdhry (Plaintiff) *Respondent.*

Baboos Chunder Madhub Ghose and *Thakoordoss Mookerjee* for Appellant.

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Baboo Ashootosh Dhur for Respondent.

In a suit for a moiety of money recovered in execution of a decree for the benefit of a joint estate, where the defendant alleged that the money was his separate property, it was held that the *onus* of proof was on the defendant, and that the mere fact that the plaintiffs had permitted the defendant in his capacity of manager of the joint family, to draw out monies in execution of a decree without objection on their part, would not raise the presumption that the money did not come from the stock, and shift the burden of proof upon the plaintiffs.—HELD also that, as the plaintiffs permitted the defendant to draw out this money without objection on their part in 1262, and made no effectual demand till they sued in 1268, though a separation took place in 1256, they were entitled to interest only from date of suit, and not from the date that the money was drawn out and appropriated by the defendant.

Kemp, J.—THE features of this case differ from those of No. 518 to this extent, that the defendant drew out the money (one moiety of which the plaintiffs claim) from the Court in execution of a decree without objection on the part of the plaintiffs.

The money was advanced, and the decree obtained when the family were joint. The *onus* of proving that the money was the separate property of the defendant is upon him, and he has failed to give any reliable evidence in support of his plea. The mere fact that the plaintiffs have permitted the defendant in his capacity of manager of the joint family, to draw out monies in execution of a decree without objection on their part, will not raise the presumption that the money did not come from the joint stock, and shift the burthen of proof upon the plaintiffs. We dismiss the appeal with costs.

The plaintiffs, respondents, have preferred a cross-appeal under the provisions of Section 348 of the Code of Civil Procedure. They contend that interest should have been awarded, not from the date of their suit, but from the date the defendant drew out the money and appropriated it.

The Principal Sudder Ameen has applied the provisions of Act XXXII of 1839. We think that this is not a debt, but a wrongful appropriation of monies belonging to the joint estate. The Court, in awarding interest, exercises a due discretion. We, therefore, think that, taking into consideration that the plaintiffs permitted the defendant to draw out this money without objection on their part in 1262 B. S., and that the present suit which was the first effectual demand was not instituted until 1268 B. S., though a separation admittedly took place in 1256 B. S., the plaintiffs are entitled to interest only from date of suit. We dismiss the appeal with costs.

The 21st April 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Limitation—Suit by Dur-putneedar to resume invalid lakheraj.

Case No. 2518 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, dated the 14th August 1863, reversing a decision passed by the Sudder Ameen of that District, dated the 2nd July 1863

Sheikh Busseerooddeen (Defendant) *Appellant,*

versus

Shibpersad Chowdry (Plaintiff) *Respondent.*

Baboo Kally Prosunno Dutt for Appellant.

Baboo Banee Madhub Banerjee for Respondent.

According to Clause 14 Section 1 Act XIV of 1859, a suit by a dur-putneedar, who purchased at a sale under Regulation VIII. 1819, to resume an alleged invalid lakheraj tenure, must be brought, not within 12 years from the date of his purchase, but within 12 years from the date when the right to sue accrued to the person under whom he claims.

Morgan, J.—THE suit was brought by the dur-putneedar who purchased at a sale under Regulation VIII of 1819, to resume an alleged invalid lakheraj tenure. The suit was instituted within 12 years from the date of the plaintiff's purchase of his putnee tenure. The defendant relied upon the Law of Limitation contained in Act XIV of 1859 Section 1 Clause 14. The Court of first instance held the suit barred by limitation. But this decree was reversed by the Lower Appellate Court on the ground that the suit having been brought within 12 years from the time when the plaintiff purchased was within time. But from the words of the Law of Limitation to which we have referred, it is clear that such suit must be brought within 12 years from the time that the right to bring it accrues, either to the person suing or to any person under whom he claims. This right has accrued to the zemindar more than 12 years before this suit, and the dur-putneedar is barred by law.

We reverse the judgment of the Lower Appellate Court, and uphold the decree of the Court of first instance, allowing this appeal with costs.

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The 22nd April 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Endowed Property—Relinquishment—Limitation—Local Investigation—Evidence (Nazir's report).

Case No. 447 of 1863.

Regular Appeals from a decision passed by the Principal Sudder Ameen of 24-Pergunnahs, dated the 12th June 1863.

Buzl Ruhim (Defendant) *Appellant,*

versus

Moonshee Lutafut Hossein and others (Plaintiffs) *Respondents.*

Mr. R. T. Allan and *Baboo Kishen Kishore Ghose* for Appellant.

Mr. C. Gregory and *Baboo Debender Narain Bose* for Respondents.

Case No. 448 of 1863.

Mussamut Khodejoonnissa Bibee, widow of Fuzl Kurim (Defendant) Appellant,

versus

Moonshee Lutafut Hossein (Plaintiff) *Respondent.*

Moonshee Ameer Ali for Appellant.

Baboo Debender Narain Bose for Respondent.

Appeal laid at rupees 11,890-1-5½

In a contest between three trustees or managers of an endowment each entitled to a third share in the profits of the property, where one of them merely withdrew from the contest, it was held that his share could only be said to have been relinquished in favor of both the remaining partners and to have merged in the general account to be rendered by the trustees or managers.

No limitation applies in the case of persons holding endowed property in trust and under accountability; but no consideration should be shown in such a case to a plaintiff who brings forward claims so stale and antiquated that difficulty arises in finding any reliable evidence whereby to decide on their validity and extent.

The report of a Nazir deputed to enquire into the condition of the property in dispute under Section 180 Act VIII of 1859, is not inadmissible because he was not an Ameen appointed under Act XII of 1856.

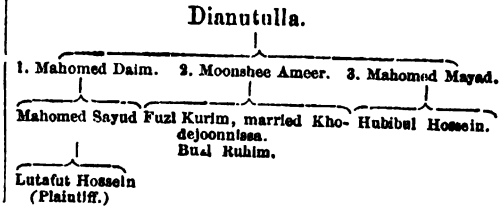
Seton-Karr, J.—THIS was a suit for a settlement of accounts and profits in certain properties, rent-free and rent-paying, of which the ancestor of the litigants had made an endowment for pious and charitable purposes. A similar suit between the same parties was decided in 1857 (*see* Sudder Decisions, page 158), but the accounts demanded were for a different period of time.

The present suit is for an 8 annas share in the profits of the said endowed property for the space of nineteen years and a half, being from the last six months of 1247 to 1266, brought on the allegation that the defendants Buzl Ruhim and his brother, the late Fuzl Kurim, and after him his widow, were the sole managers of the property; that they rendered no accounts; that they have discontinued the practice of religious ceremonies and of charitable donations, and have otherwise mismanaged the property.

The defendant, Buzl Ruhim, denied being in possession or management of the property. Khodejoonnissa, the widow of Fuzl, admitted management, but said that her servants had rendered her no accounts. The Principal Sudder Ameen went at length into the case, took evidence as to receipts and expenditure, formed his own conclusion, and ended by giving the plaintiff a decree for rupees 11,890 out of their whole claim of rupees 48,240.

The defendants appeal separately against the decree, and there is a separate cross-appeal on the part of the plaintiffs under Section 348 of the Code.

The position of the parties with respect to the half share of the property is herewith shewn :—



Originally, it is thus shewn, the plaintiffs and defendants were entitled each to a share of one-third in the property. But in the former suit already alluded to, Hubibul Hossein threw up all claim to his share of one-third, which, the plaintiff contends, then fell into the common stock, and augmented the share of the plaintiff to one-half of the whole.

As regards this point, which was fully contested before us on both sides, we think it necessary at once to state our opinion that the terms of the deed of the 1st of April 1848, by which Hubibul Hossein waived his claim to any share, show clearly that he merely withdrew on his own account, from all claim and contest. His language on that occasion does not amount to a transfer of his rights to Fuzl and Buzl Ruhim; nor do we think that, had his language been precise and positive or to such effect, the plaintiff would be debarred from advancing his legal claims to his share to the one-third so abandoned. It is quite clear to us that the share of Hubib-

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ul Hossein could only be said to have been relinquished in favor of all the partners, and to have merged in the general account, which the trustees or managers of the endowment would one day have to render.

As regards an argument of limitation raised for the defendants in bar of the plaintiff's claim, we think it only necessary to state at once that no argument of this kind can prevail in the case of trustees such as the defendants who held the endowed property, whether such were the original share of the plaintiff or that portion of the share of Hubibul Hossein that devolved on them, in trust and under accountability.

On the other hand we must observe that the delay of the plaintiff in suing for his share of the profits, especially after the result of the long litigation which only terminated in 1851, is wholly unaccounted for; and that in conformity with the best authorities (Story on Equity, page 611), we shall not be disposed to treat with any tenderness a plaintiff who has shewn such laches, and has brought forward claims so stale and antiquated that difficulty arises in finding any reliable evidence whereby to decide on their validity and extent.

We have heard most of the evidence for the plaintiff and for the defendants, and we have carefully examined the basis of the Lower Court's decision which we find to be based mainly on the accounts taken of the receipts in the litigation which commenced before 1846, and ended only on the 25th of March 1851.

We agree, generally, with the Lower Court on the estimate which it has formed of the evidence, oral and documentary, tendered by the defendants. It is not satisfactory, and we cannot but hold it highly improbable that the assets of a property scattered through many populous and rich villages in Baraset should have been wholly inadequate to the calls made on it for pious and charitable disbursements, which, it is tolerably clear, have of late years decreased in amount. In deciding this suit, then, we discard this evidence for the defendants altogether.

But neither do we think the accounts of the previous litigation, on which the Lower Court has relied, ought to form the sole basis of our decision. And we observe that the Lower Court has rejected as illegal the report of the Nazir who was deputed to enquire into the condition of the property under Section 180 of the Code of Procedure. Why this official's report should not be evidence, merely because he was not an Ameen appointed under Act XII of 1856, we are wholly at a loss to discover, when we consider the provisions of the Section quoted.

We take, therefore, his report to which the defendant made no objection on the score of inadmissibility, as well as the evidence on the plaintiff's side, and we compare them with the accounts tendered in the last suit, and then admitting that it is out of the question to strike a balance with any thing more than an approximation to the real state of things, we fix the income of the share representing the damages to which the plaintiff is clearly entitled much as a Jury would assess the same in a case for damages.

And, in this view, we are proceeding on fair and equitable principles in ruling that the assets of the lands, rent-free, with rent-paying, shall be taken to be one rupee the beegah all round. This, for lands so situated, cannot be either very excessive or very inadequate, and the plaintiff has only himself to thank for the delay which has rendered it impossible to say for certain what has been the exact rent of these lands for the whole of the long time during which no accounts have been rendered or called for.

Next, we have to consider the extent of the lands on which rent at this amount must be considered as having been received. Here we have heard the cross-appeal of the plaintiff for the 652 beegahs of land resumed by Government, and settled with Fuzl Kurim on the 15th of April 1850, which lands have been excluded from the decree. After hearing the arguments on both sides, we are of opinion that the Lower Court has erred in ruling that the plaintiff was bound to sue under Act XIII of 1848 for his separate rights within 3 years after the settlement had been concluded with Fuzl Kurim. The settlement papers expressly say that the rights of other shareholders are not prejudiced by the engagement entered into by Fuzl; and, looking to the principle which must guide us in the decision of this whole case, we can hold this part of the endowment to have been held like the rest by the defendants in their capacity of trustees and managers for the other shareholders. In this view no such limitation applies. We, therefore, admit the right of the plaintiff, as contended in his appeal, to have this property included in his claim. But we wholly reject his claim to 5 *kahans* of rice, and his claim on account of some houses which the defendants are said to have allowed to

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fall into disrepair. The claim to the rice apparently rests on the old litigation, which, it is gravely argued, shows that this amount of rice must have remained over and above for subsequent years. It is obviously quite unreasonable to require defendants to account for the disposal of this raw produce at such a distance of time, during which any rice in store was doubtless properly expended, and the claim on account of the houses is simply preposterous and rests moreover on very uncertain evidence.

We take, then, the following lands and no others, neither gardens nor tanks, as liable for the plaintiff's 8 annas share of the profits :—

			Beegahs.
Nij Jumma	...	...	1,989
Mahatran	...	...	629
Resumed ditto	...	...	652
			3,260

This will give a return, at one rupee per beegah, of 3,260 rupees a year.

From this we must deduct the Government revenue on the resumed mahatran lands, which the settlement shows to be 410 rupees a year. And, as regards expenses, we shall allow an annual round sum of 2,000 rupees for the establishment and for pious and charitable expenses, &c., which sum is very nearly the amount taken in the former suit, and cannot be very wide of the mark taken by the witnesses for the plaintiff, who admit that, during the life-time of Fuzl Kurim, the festivals of the Eed and the Mohurrum were still celebrated with some show of wealth, and that guests were entertained with something of liberality.

We cannot, however, admit that, since the death of Fuzl, the expenses can have sunk as low as one hundred rupees a year, and from this date, which we are certified is the 9th of Jysto 1263, we shall allow a reduction of only one-half in the said expenditure, which will reduce it to 1,000 rupees a year.

While admitting the plaintiff's legal right to demand an account of the profits, we cannot allow him to exercise this for one day beyond 12 years; and we shall thus treat this case as one of a demand for wasilat which, under a very recent ruling of a Full Bench of this Court, has been limited to the above period, although the origin of the right extended much beyond 12 years.

Neither can we allow that any claim to any part of the share of Hubibul Hossein can arise in the plaintiff's favor before this share was actually surrendered and fell into the common account. But this surrender happens to be about 12 years and a few months previous to the present suit. The decree will, therefore, be for the plaintiff for one-half of the profits, calculated at the above rate and subject to the above deductions, for 12 years, with interest at twelve per cent. from the date of this decree.

The only point now remaining for consideration is whether the decree shall run against both defendants or against the widow of Fuzl only. Seeing that the property of the latter is ample to meet this claim; that, in her written statement, she admitted her sole possession to the exclusion of her husband's brother; that the oral evidence to possession and management by Buzl is not very precise or satisfactory; and that the pleader for the plaintiff is content to take a decree against the widow only,—we restrict the operation of the decree to her and to the property which she holds either in her own right, or in that of her husband Fuzl Kurim.

Buzl Ruhim will be discharged from liability, paying his own costs of suit.

The decision of the Lower Court will be modified accordingly; and seeing that we are not satisfied with the conduct of plaintiff throughout, both parties, plaintiff and defendant, may pay their own costs in this appeal; costs in the Lower Court being awarded to the plaintiff against Khodejoonnissa in proportion to the amount now decreed in her favor.

The 22nd April 1864.

Present:

The Hon'ble Shumboonath Pundit, *Judge*.

Hindoo Law—Adoption (of Leper's son).

Case No. 204 of 1864.

Application for review of judgment passed by Justices Morgan and Shumboonath Pundit in Special Appeal No. 1235 *of* 1863, *dated the* 15*th of January* 1864.

Annud Mohun Mozoomdar and others, *Petitioners,*

versus

Gobind Chunder Mozoomdar and others, *Opposite Party.*

Roy Sreenath Sein for Petitioners.

Semble.—The Hindoo Law does not prevent a leper from giving his son in adoption.

PETITIONER contends that the Lower Court did not find any issue for the determination of the question whether the

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natural father of the adopted son being sick of leprosy, could legally give his son in adoption. Now the adoption was at issue in the case, and it was not at all necessary to make separate and distinct issues regarding the several acts and proceedings connected with the adoption. The petitioner as plaintiff was bound to prove, first, the fact that the natural father was so sick, that, under the Hindoo Law, that disease could operate as a bar to his power to give his son in adoption. The petitioner does not pretend to say that he has done so, and his pleader here cannot shew any text in support of his Hindoo Law point. As there is no proof of the fact of the diseased state of the natural father, and also nothing to suggest that, assuming the fact to be as the petitioner alleges, he is in a position to make anything of his law point, I see no reason to admit the review, and so reject this application.

The 22nd April 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Interest.

Case No. 2345 of 1863.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 4th May 1863, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the 12th August* 1862.

Parbutty Churn Soor (Defendant) *Appellant,*

versus

Promothonath Ghose and others (Plaintiffs) *Respondents.*

Baboos Banee Madhub Banerjee and *Kedar Nath Chatterjee* for Appellant.

Baboos Dwarkanath Mitter and *Onookcol Chunder Mookerjee* for Respondents.

Plaintiffs, in execution of a decree against *A*, attached certain money deposited in the Collectorate to which *A* was entitled; but were opposed by *B* alleging that *A*'s rights in the money had been transferred to him. Plaintiffs finally succeeded in obtaining the money, and now sue *B* for the interest upon it for the time he prevented their obtaining the money. HELD that the suit was maintainable.

Jackson, J.—THE plaintiffs in this suit had obtained a decree for a certain sum of money against one Hurrocoomaree Dossee, and in execution of this decree attached certain money deposited in the Collectorate to which she was entitled. The plaintiffs were, however, opposed for some time in obtaining possession of that money by the present defendant, Parbutty Churn Soor, who alleged that Hurrocoomaree's rights in it had been transferred to him. Plaintiffs finally succeeded in obtaining the money, and they now sue Parbutty Churn Soor for the interest upon it for the time during which he prevented their obtaining the money.

Both the Courts have decreed the claim.

On special appeal it is said that the interest may be due from Hurrocoomaree, but cannot be due from Parbutty Churn Soor, as he had no legal privity with the plaintiffs and had *bonâ fide* put forward a claim to the money under an assignment from Hurrocoomaree.

We think that the Lower Courts are right. Parbutty Churn kept the plaintiffs out of their money. He chose to take upon himself Hurrocoomaree's rights in that money, and with it took upon himself her liabilities as respects it. He has his redress. But he, having injured plaintiffs, must make the amount of their loss good to them.

Appeal dismissed with costs.

The 23rd April 1864.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Evidence—Accounts.

Case No. 497 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 8th July 1863.

Moortee Ram Baboo (Defendant) *Appellant,*

versus

Laljee Sahoo and others (Plaintiffs) *Respondents.*

Mr. J. Cochrane and *Baboo Tarucknath Sein* for Appellant.

Baboos Kishen Succa Mookerjee, Onookool Chunder Mookerjee, and *Bhyrub Chunder Banerjee* for Respondents.

It is unnecessary to prove by independent evidence the correctness of every single item of an account extending over 7 years, in the absence of any denial of the correctness of any one of those items.

Jackson, J.—THE plaintiffs are bankers in the town of Patna. The defendant Moortee Ram and his brothers Sreeram and Huree Ram carried on a joint banking business in the town of Mozufferpore.

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The plaintiffs sued to recover from the three brothers rupees 5,904-12-3 principal, and rupees 3,105 interest, total rupees 9,009-12-3, due from them on a balance of account. The plaintiffs produced their account books, shewing all the different items of transactions which had taken place between the two banking firms from the year 1262 to the year 1267, when they alleged that all transactions ceased. They further produced witnesses, *viz.* their gomastah who deposed to the amount of the balance due and who attested their banking books, which corroborated his statement as to the debt.

The defendants Sreeram and Huree Ram did not appear or contest the action.

The defendant Moortee Ram appeared in person, and deposed that he was unable to make any defence to the action, because, in a suit then pending between him and his brothers in the Supreme Court, the Receiver of that Court had been ordered to take possession of all his account books. He requested that the Receiver might be made a party to the suit, and the account books be sent for.

The Principal Sudder Ameen sent for the account books, but apparently received no reply from the Receiver. He ordered the defendant to put in his defence; and after fixing the points which required proof, and hearing the plaintiff's evidence, he, in the absence of any defence, decreed the claim against all three defendants.

Moortee Ram alone has appealed to this Court. It is contended in his behalf that the Receiver should have been made a party to the suit; that he was unable to obtain access to his books; and that the Receiver had been directed by the Supreme Court to defend all suits brought against the defendant's firm.

The proceeding of the Supreme Court to which the appellant's pleader alludes directed that the Receiver should be at liberty to defend any suit brought against the firm. But on such a suit being preferred, it was incumbent on appellant to bring the circumstance to the notice of the Receiver, and either to require the Receiver to put in a defence, or to apply to be allowed to examine the books and put in a defence himself. Nothing has been read to us to show that the appellant took any steps whatever to contest the suit. He does not satisfy us that the Receiver refused to allow him access to his books, or that he requested the Receiver to defend the action. The suit was pending for three months from February to July, after the appellant had been ordered by the Principal Sudder Ameen to file his defence. During that time it is not shewn to us that the appellant took any action in the matter of the suit. And even now, when nearly a year has elapsed, and these proceedings in appeal have been taken, no attempt is made to shew what the appellant's defence to the action consists of. Not a single item of the account is contested, but it is alleged that items to the appellant's credit have been omitted. It is to be considered also that the appellant's brothers, who must have had the same interest in defending a false claim as the appellant, have not from the first objected to it. These brothers now ask to be heard as respondents under Section 348 of the Procedure Code; but we are clearly of opinion that they are not respondents, and having failed to appear in the Lower Court or to appeal, that they cannot be heard now.

On the above considerations we are of opinion that the appellant has not satisfied us that he was vigilant in defending this suit, or that there was any necessity for making the Receiver a party in it.

It is then contended by Mr. Cochrane that the evidence offered by the plaintiffs in support of their claim is insufficient; that plaintiffs were bound to prove distinctly every item of their account by producing their vouchers for all payments made; that no such evidence was offered, but that the books alone were produced and attested by the gomashtah; that under Act II of 1855 such books may be *corroborative* evidence, but are not independent proof of the facts stated in them.

Baboo Kishen Succa for the respondents in answer stated that the appellant, not having complied with the directions of the Lower Court to file his defence, could not appeal; that the decision of the Lower Court, under such circumstances, must be considered to be *ex parte;* but that, even if the appeal was admissible, still in the absence of any denial of the truth of any item by the appellant, it was not necessary to produce more evidence than his clients had produced.

We think that the defendant is at liberty to appeal. He appeared in the Lower Court, and *ex parte* decisions are passed only where defendants do not appear. The decision in this case was passed by the Lower Court under Section 148 Act VIII of 1859, *i. e.* on the evidence on the record.

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We think also that the plaintiffs have sufficiently proved their case. The evidence required in the case of an undefended suit is not of the same strict nature as in that of a defended suit. Items which are declared to be false would perhaps require vouchers and special evidence to the transactions connected with those items. But it is unnecessary to prove by independent evidence the correctness of every single item of an account extending over seven years in the absence of any denial of the correctness of any one of those items. The party sued may put in issue any or all of the items; but, if he fails to do so, there is no necessity for the Court examining in detail the correctness of each several item. Mr. Cochrane has referred to 5 Moore's Indian Appeals, page 432, to shew that the Privy Council has held that the production of Banker's books is not of itself sufficient evidence to establish a claim. But they have also held that, although books are not conclusive evidence of the different items of entry contained in them, still the necessity of strict proof is removed by the admission of a defendant, or by the absence of any evidence on his part to impeach the accuracy of the books (6 Moore's Indian Appeals, page 88). In this case the appellant, if he did not admit the plaintiff's claim, certainly did not deny any single item in it, although the plaintiff had given a full account of every item of the transactions between them, and even now the appellant does not deny that the account as far as it is recorded is correct; he would only add to it other items, and his partners in the firm have virtually by their silence admitted the correctness of the whole of plaintiff's claim.

Upon a full consideration of the arguments of the pleaders and of all the facts and evidence in the case, we are of opinion that the Principal Sudder Ameen was right to decree the claim, and we dismiss this appeal. The appellant will pay the respondent's costs.

The 23rd April 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonauth Pundit, *Judges.*

Jurisdiction (of High Court as a Court of Revision) — Erroneous order of dismissal for default — Section 347 Act VIII of 1859.

Case No. 2011 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 22nd April 1863, affirming a decision passed by the Moonsiff of Furreedpore, dated the 31st December 1861.

Soodhamonee Dossee (Plaintiff) *Appellant,*

versus

Gooroopersaud Dutt and others (Defendants) *Respondents.*

Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Appellant.

Baboos Kali Mohun Doss and *Greeja Sunker Mozoomdar* for Respondents.

Where a Lower Appellate Court, after 11 months' delay, and without fixing any time for disposing of the appeal, made an order dismissing the case for default, the High Court set aside the order as erroneous, holding that it was the subject of an appeal, notwithstanding Section 347 Act VIII of 1859 which only applies to cases of involuntary failure to comply with a Court's order.

Morgan, J.—On the appeal to the Lower Appellate Court, a question arose as to the due service of notice upon one of several respondents. The Court makes an order upon a petition presented by one of the co-respondents relative to the omission of service of the respondent in question. The order is that the appellant do explain the matters stated in the petition, *i. e.* explain why he has not served the respondent in question at some place named. Whether the appellant was aware of the petition and order or not, does not appear. Nothing is shown by way of compliance with it; and after the lapse of 11 months, the Court proceeds to dispose of the suit. There were several respondents in the appeal, all of whom had been duly served. The Court, therefore, even if there were some defect in regard to the service of this particular respondent, might have proceeded to a hearing of the case as regards the other respondents. But the proceeding of the Court seems to us to have been wholly irregular. After 11 months' delay, and without fixing any time for disposing of the appeal, it makes an order dismissing the case for default. The Court should not have made that order, and if we are competent under any provision of the Code of Civil Procedure to set it aside, we shall do so as we think it is one that ought not to stand.

The second question which arises is whether that order can be made the subject of revision here under the present law of appeals. It is insisted that, under the 347th Section of the Code, after a dismissal for default, the only remedy is by application to the Appellate Court which makes the order of dismissal. The terms of that Section appear to us to apply to cases where there is an involuntary failure to comply with a Court's order, such as this—the summons or notice

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of the day of hearing never reaches the person for whom it is intended, who is therefore unable to attend at the Court at the time mentioned. That is an involuntary non-appearance. The suit having been decided by default in his absence, the proper mode of remedying that, is that he should go to the Court and explain to its satisfaction the reason for his non-attendance, upon which the Court sets aside the order of dismissal for default. But that provision would seem to have no application to such cases as the present one.

It appears to us that this order of dismissal for default may, like an erroneous decision, be the subject of an appeal.

Holding that we have authority to set aside the order, and that the order itself is erroneous, we shall allow the appeal and remand the case.

If there is any defect in the service of notice on any particular respondent, that may be corrected, or if not corrected, the appeal should be duly heard and disposed of as regards the other respondents. At present it has been struck off without a trial and dismissed for default.

The 23rd April 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Hindoo Widow — Maintenance.

Case No. 2243 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of 24-*Pergunnahs, dated the* 9*th June* 1863, *affirming a decision passed by the Additional Moonsiff of that District, dated the* 20*th December* 1861.

Debur Ramnath Roy Chowdry (Defendant) *Appellant,*

versus

Sreemutty Arnee Kally Debia (Plaintiff) *Respondent.*

Mr. John Cochrane and *Baboo Romanath Bose* for Appellant.

Baboo Anund Chunder Ghosal for Respondent.

A Hindow widow has a right to be treated with kindness by her father-in-law, and to be suitably maintained by him.

Seton-Karr, J.—THE points argued are: 1*st*, want of jurisdiction; 2*nd*, failure to enquire into the alleged verbal authority of the father-in-law for the payment of maintenance.

As regards the *first* point, we find that the defendant admitted residence at Bhowanipore at the time when the suit was brought. This is quite sufficient to give the Court jurisdiction.

On the *second* point, the case, we observe, has been fully enquired into with a view to ascertain the ill treatment alleged by the plaintiff at the hands of the defendant and her right to maintenance. Both facts are found in her favor, and the alleged permission or expressed wish of the father-in-law, whether proved to have been given or not, would not alter the matter. The Hindoo widow has a right to be treated with kindness and to be suitably maintained. Both the Lower Courts have found for her, and while regretting that their decisions and the payment of maintenance should have again been called in question, we have only to dismiss the appeal with costs.

The 25th April 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Mortgage Accounts.

Case No. 64 of 1861.

Application for review of judgment passed by Justices G. Loch and C. Steer in Regular Appeal No. 446 *of* 1859, *dated the* 22*nd April* 1861.

Ram Kissen Sing, *Petitioner,*

versus

Shah Kundun Lall and others, *Opposite Party.*

Mr. R. T. Allan and *Monshee Ameer Ali* for Petitioner.

Messrs. G. and *C. Gregory* and *Baboos Kishen Kishore Ghose* and *Unnoda Pershad Banerjee* for Opposite Party.

Exposition of the nature of the accounts to be kept by a mortgagee in possession.

Loch, J.—THIS was a suit for an account of collections realised by the defendants while mortgagees in possession of the plaintiff's property, and to recover from them the sum of Rs. 21,407, alleged to have been collected by them in excess of the debt with interest due by plaintiff.

The first Court dismissed the suit, and an appeal was preferred by plaintiff and decided by this Court on 22nd April 1861

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in plaintiff's favor, the decision of the Lower Court being set aside, and a decree for some portion of the amount claimed by plaintiff passed.

The decision come to by this Court rested, among other things, on the fact that the defendants, who were mortgagees in possession, had failed to file the accounts which they are required to do by law, Regulation XV 1793 Section 11.

The defendant filed a petition for review, stating that the accounts, such as the Court required and the law enjoined, had been filed in the Lower Court; but when the record was transmitted to this Court, these had been left behind, and the pleaders for the respondents were ignorant of this fact when the appeal came on for hearing.

The review was admitted on 9th April 1862. The accounts were ordered to be sent for and laid before the Court, and the case came on for hearing this day.

The accounts laid before the Court now for the first time consist of certain jummabundee papers alleged to have been prepared by the village putwarries, and filed by them in the defendant's (respondent's) office year by year during the period defendants held possession of the property, and they are produced from the custody of the defendant's servant Oojakur Lall Mootasuddie, who had charge of them, and who, on the 23rd October 1857, deposes that these papers were placed in, and have been produced from his custody, and that they are the accounts of the mortgaged villages, prepared by the putwarries for the period in question.

It is urged that these papers prove two facts: *first*, that the assets of the villages were misrepresented by the plaintiff, as the detail of collections exhibited in these accounts satisfactorily shows; and, *secondly*, that, accepting these accounts as correct, it is evident that a considerable balance remains due to the defendants up to the present time. According to an account prepared by the defendants, the sum due is Rs. 5,787-8-5, while, on these accounts, a larger balance would be found due. That, comparing these with the jummabundee papers filed by the putwarries in the Collector's office, which were produced before the Court on the previous occasion, it will be found that they correspond, and there can be no question as to their genuineness, for they have come from the proper custody, and were deposited by the putwarries themselves, who, when delivering them to the defendants' agent, acknowledged that they were correct. It is further urged that, under the peculiar circumstances in which the defendants are placed, it is impossible for them to furnish other or better accounts. They are strangers living at Lucknow and have never seen the property in question, the mortgage of which was taken by their agent at Chuprah on the occasion of a loan to the plaintiff; and it is, therefore, impossible for them to comply with the strict letter of the law, and produce private accounts of the collection and expenditure and swear to their correctness. Nor, it is urged, is plaintiff entitled, in the event of the defendants failing to satisfy the Court as to the correctness of their accounts, to the sum he claims; but he must prove to the satisfaction of the Court that the assets of the estate are such as he states them to be.

We think that the accounts now produced before the Court will not help the defendants' case at all; for, *first*, they are not the accounts which by the law a mortgagee is required to keep; and, *secondly*, they are not proved to be correct. A servant of the defendants, in whose custody they were, has produced them; but his evidence only goes to prove that they were delivered to him, and have been since in his custody, and are produced therefrom, but it proves nothing as to the truth of the details contained in them. The putwarries who prepared these accounts have never been called upon to prove their correctness. The fact of their corresponding with similar papers in the Collector's office will not help on the case for those papers, inasmuch as these require to be proved before they can be admitted in evidence. We must, therefore, reject these papers as well as the copies received from the Collector's office as establishing nothing, because they have not been proved.

Looking to the wording of the law and the decision of our Courts, it appears that the account which the mortgagee is required to keep is independent of the putwarry accounts which may be used as a test of the accuracy of the accounts filed by the parties. The mortgagee's account must be prepared by himself or by his own agent, and must comprise the gross receipts realized from the tenantry, and not merely what actually reaches the mortgagee's hand. These accounts must be full and complete, and not mere abstracts of the receipts during the period of the mortgagee's possession. An account professing to show the demand

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and collections from the tenantry for any one year should be supported by detailed accounts showing each item of collection from every individual mentioned in that total sheet. It is not a sufficient reason for the non-production of the accounts required by law, for the defendants to say that, under their peculiar circumstances, they could not keep them. If, in the course of carrying on their business, defendants, as money-lenders, see fit to secure themselves from loss by taking mortgages of landed property, they are bound to deal with that property in the manner prescribed by law, and their distance from or want of knowledge of the locality will not exempt them from liabilities and responsibilities enjoined by law which, by taking a usufructuary mortgage, they have necessarily and voluntarily taken upon themselves. In their decision of the 22nd April 1861, the Court, after having fully entered into the question, determined how the plaintiff's claim was to be settled, and ordered an account to be drawn up accordingly. We see no grounds for making any alteration in that order, and dismiss the review, upholding our former decision with costs.

The 25th April 1864.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Sheriff's Sales—Law applicable to.

Case No. 277 of 1861.

Regular Appeal from a decision passed by the Judge of Backergunge, dated the 15th May 1861.

Gopee Chunder Chuckerbutty (Plaintiff) *Appellant,*

versus

Ram Kumul Ghose and others (Defendants) *Respondents.*

Mr. R. V. Doyne for Appellant.

Messrs. G. C. Paul and *R. T. Allan* and *Baboos Dwarkanath Mitter* and *Kali Mohun Doss* for Respondents.

Case No. 313 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, dated the 21st March 1863.

Messrs. E. Brown and A. DeSilva (Plaintiffs) *Appellants,*

versus

Ram Kumul Ghose and others (Defendants) *Respondents.*

Baboos Khetturnath Bose and *Unnodapersad Banerjee* for Appellants.

Baboo Kali Mohun Doss for Respondents.

The law of the mofussil is the *lex rei sitæ* at Sheriff's sales, and controls or modifies the English Law as to execution and delivery.

Seton-Karr, J.—These two appeals arise out of a series of facts which are not disputed before us, and which are as follows :—

Thomas Paul DeSilva confessed judgment, through an attorney, in the Supreme Court in October 1852, on a bond for 9,773 rupees.

On the 29th of June 1855, a writ of *fieri facias* was issued to the Sheriff to levy this sum on the confession of judgment. On the 28th of August 1857, the Sheriff returned the writ with an endorsement to the effect that he had levied the sum of Rs. 1,006-4-5 on the confession of judgment. On this, an *alias* writ issued almost immediately, or on the 3rd of September 1857, in which the first writ and the balance still due were recited, and by which the Sheriff was directed to levy the said balance of Rs. 8,767-15-8. The Sheriff then proceeded to seize other property of Mr. Thomas P. DeSilva, which had not been discovered when the first writ was issued ; and on the 26th of November 1857, he put up the same to sale, when it was bought as the right, title, and interest of Thomas P. DeSilva by the plaintiffs in the two cases before us, namely, by Antonio DeSilva and Gopee Churn, in equal shares.

Intermediately Thomas Paul DeSilva had demised, having died on the 7th February 1857, leaving a will by which he constituted Mr. Edward Brown his executor, and devised to him the very property now in contest which appears to be a valuable talook situated in Pergunnah Buzurg Umedpore.

The purchasers at the Sheriff's sale had applied for a notice to Brown to show cause why they should not be put in possession ; but though Brown did, on the 16th of November, empower his attorneys Messrs. Paul and Carruthers to appear for him, no cause apparently was shown, and certainly the order issued for the possession of the plaintiffs.

Subsequently, the Sheriff gave possession in the usual manner by application to the Magistrate, and by sending his own officers to the spot ; and the Darogah who was sent to aid the Sheriff's officers, reported on the 11th of August 1858, that possession had been

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given, but that disturbances were likely to ensue.

After this followed a case under Act IV of 1840, and the Magistrate, on the 3rd of December 1858, confirmed the possession of Mr. Edward Brown through his putneedars, *viz.* the Gohoo defendants, who had taken a portion of the talook in Magh 1263 or February 1857, from the executor Brown in the name of Ram Kumul Ghose.

The plaintiffs, purchasers at the Sheriff's sale, have now sued to cancel the Act IV award, and to obtain direct possession, and on their separate suits for the same object, first the Judge, and then the Principal Sudder Ameen respectively, have put them out of Court, ruling, with advertence to Act VI of 1855, that the property sold was not liable for the debt on the bond; that the same had not been attached by the creditor as it ought to have been under the invariable practice of the Mofussil Courts; and that the purchasers at the Sheriff's sale had therefore bought nothing.

The appeals have now been very fully argued before us on the points of law arising out of the state of things above disclosed by Mr. Doyne on the one hand for the plaintiffs, and, on the other hand, by Mr. Paul for the executor and devisee, and by Mr. Allan for the putneedars under the devisee.

The points successively discussed before us may be stated as follows:—

1. Does English Law apply to this sale and possession of the Sheriff, or does the law of the Mofussil Courts interfere?

2. If English Law applies, does the judgment of 1852, or does the issue of the writ to the Sheriff in 1855 bind the land?

3. If it be held that, not the judgment, but the writ, binds the lands for the debt, then did the efficacy of the first writ abate or expire after a year and a day, or on the date of its return in August 1857, and before the *alias* writ was issued?

4. Does the intermediate death of the testator and debtor make any difference, and does the fact that the property only came into the possession of the testator in October 1856, or subsequent to the judgment and the writ, make any alteration in the rights of the litigants?

5. If the claims of the purchasers at the Sheriff's sale be preferential to those of Brown, the executor and devisee, are they preferential to those of the putneedars who hold and derive from Brown?

In the course of argument, reference was made by the Counsel on both sides to Act VI of 1855, and to Regulation VII of 1832; to the Reports of the late Sudder Court for 1854, page 449, and for September 1859, page 1417; to Vol. I of the Select Reports of the same Court, page 115, and to Vol. VII, page 362; to Sewell's Treatise on the Law of Sheriffs, page 251; to the cases reported in the late Supreme Court, Sreenath Neogy *vs.* Stopford, page 144 of Taylor and Bell; to Boulnois, page 234; to Fulton, page 33; to Story's Conflict of Laws, page 361; to Macpherson on the Civil Code, page 47; and to Archbold's Practice, Vol. I, page 544.

The above Acts and cases, and the arguments on both sides deducible therefrom, have had our fullest and most attentive consideration.

It is argued by Mr. Doyne as to the law that should regulate this case that it must be governed by English Law, or by none other, for the testator and judgment-debtor being a Portuguese, neither Hindoo nor Mahomedan Law can be of any force; and that the only law which can apply is the English Law of the Supreme Court, from judgment to sale and execution; that the law governing the case is the *lex rei sitæ*, and that the practice of the Lower Courts in such cases is merely *lex fori*, or one of Procedure; that, if English Law be held to be applicable, it binds the lands for the debt from the date of judgment; that all alienations or encumbrances are voided by the existence of the debt; and that, even if there be any doubt as to the power of the judgment to bind the lands, the delivery of the writ to the Sheriff binds the real property, and would bind the immoveable property even in the case of Hindoos; that the first writ never abated, was perfectly regular, and must bind both land and chattels; that the purchasers obtained peaceable possession through the Magistrate; and that the recourse to the Magistrate for the aid of the Police did not in any way alter the course of Procedure, which could not be that of the Mofussil Courts, but that of the Supreme Court from beginning to end; that Mr. Brown had due notice of the sale and purchase, as appears by his letters to his attorneys; and that his claims and the claims of those who hold under him must be set aside in favor of the Sheriff's purchasers.

Against this it was contended by Mr. Paul that the rule, as laid down by Sir L. Peel in the case of Musleah *versus* Musleah and in other cases, shows that the English Law is modified and controlled by local and other

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laws in such cases, and is not to be applied with unbending rigidity; that the judgment does not bind the land unless registered pursuant to the 2nd of Victoria; and that no law of registration of that kind exists in this country; that lands in the hands of a devisee could not be bound even by English Law; that the suit abated by the intermediate death of the debtor and testator; that the first writ had abated, and that the devisee and executor had no notice whatever of the same when he created the patnee in February 1857, which date was several months prior to the delivery of the *alias* writ; that the *lex rei sitæ*, which admittedly governs this case, is and must be the law of the Mofussil Courts, and that that law under repeated decisions says that alienations made by the debtors prior to actual attachment by the creditors are good and valid; that the law of the Mofussil Courts is not merely a *lex fori* in such cases, but a substantive law; that the suit in the Supreme Court was not notice to all the world; and that the devise and the creations under the devise are *bonâ fide* good and valid and should be allowed to stand, according to the decision of two separate Judges in the Lower Courts.

The same arguments were still further pressed on us by Mr. Allan for the putneedars who, with reference to the precedents cited of the Supreme and Sudder Courts, contended that the Sheriff's purchasers had bought nothing, and that his client had paid a valuable consideration for a property to a person who had a full and perfect right to the same, and that, under the strictest rulings of law, they should be maintained in possession, whatever might be the ruling of the Court with regard to the rights of the executor.

In considering the first point, our attention has been first directed to Act VI of 1855, and to the judgments of the Supreme Court noted in the margin.

Fulton's Reports, page 33.
Taylor and Bell, page 144.
Boulnois, page 58.

On this we observe that, as ruled by the Judge in the Lower Court, the lands in this instance were certainly not in possession of the judgment-debtor at the time when the Sheriff's officer went to the spot. They had before that date passed into the hands, first of the devisee, and then of the putneedars under transactions of which the good faith is not now called in question. Clause 3 Section 1 of the Act of 1855 rules that, in such cases where the lands are in the possession of any person other than the debtor, the Sheriff "shall not seize the property, but shall sell and convey all the right, title, and interest of the debtor." True it is that the sale had been effected, the property being out of the limits of the local jurisdiction of this Court, before the fact of any such possession could be practically ascertained; but it is equally clear to us that the forms of the law were not observed; that the Sheriff's officer had no business to aid the plaintiff in obtaining kubooleuts from the ryots when the judgment-debtor was not in possession, and that the criminal authorities were therefore legally justified in keeping the putneedars in possession until such time as the right to the lands should be decided. The judgment-debtor not being in possession, the language of Clause 2 Section 1, in respect of lands, "of which an actual delivery can be made," would therefore not apply; nor are we clear that the practice, in regard to the writs laid down in Section 11 of the Act in question, had been faithfully observed, *viz.* that the writ had been renewed within the year.

But we intend to decide this question on much broader grounds than the observance of the forms of the law quoted above. We have to consider whether the *lex rei sitæ* which must govern the case is to be that of the English Law and the Supreme Court, or whether it shall be that of the Mofussil Courts, not as a mere law of procedure, but as a substantive law rightly applied to such cases.

In the case of Bindabun Doss *versus* Ootumchand, quoted at page 33 of Fulton's Reports, it was the opinion of Chief Justice Peel that, by the Hindoo Law, assets which had gone *bonâ fide* into the hands of a purchaser could not be followed by the judgment-creditor of a testator. It was admitted that, had the case been under English Law, the complainant might have had a title to redeem the mortgage under which the defendants held, but it was laid down clearly that a creditor cannot follow an estate where his claim is against the assets generally; and in the conclusion of the judgment, it is stated that "a judgment gives no lien upon lands, nor does a writ, until executed by the Sheriff."

In the case of Sreenath Neogee *versus* Stopford, Sheriff, the Court also ruled that, as a writ had been delivered to the Sheriff prior to the delivery of a mortgage deed to the plaintiff, such writ bound the property from the time of delivery and over-rode the assignment to the plaintiff.

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On a subsequent motion to set aside the verdict for the defendant, Chief Justice Peel ruled that any alienation, except in market overt, would not prevent the execution-creditor from following up the goods, and the Court seemed to think that property, coming after the delivery of a writ to the Sheriff into a debtor's possession, was not protected in the hands of subsequent purchasers.

But the property in this case, we observe, consisted of chattels, and not of real property.

The last case to which we have referred is that of Musleah *versus* Musleah, page 59, of Boulnois' Reports, which case refers to the case of Shib Chunder Doss *versus* Shib Kissen Banerjee, printed a few pages further on. In this the principles applicable to adverse possession of lands in the Mofussil are fully discussed and explained by Chief Justice Peel. "On what principles," he says, "can it be argued that the English Law governs in this suit between Hindoos as to land situated in the Mofussil;" and the learned Chief Justice then proceeds to say "the English Law is the law of the Court, but that law embraces all local laws and customs as to immoveable estate, which local customs, where they prevail, vary and so far control the general law." He further says "why should circumstances personal to the claimant affect the title of the actual enjoyer of the lands, when the question is not one of personal laws, but one affecting immoveable estates, as to which, by the general law as understood by jurists of all States, the law of the place where the thing lies is that which generally should decide the dispute."

We observe that it cannot be contended that the parties in the case now before us are British subjects in any sense of the term, (both the DeSilvas being Portuguese, and the other purchaser being a Hindoo), to whom English Law would apply, or to whom, even when resident beyond Calcutta, the jurisdiction of the Supreme Court would attach. It is urged, however, that English Law must govern the case, as the judgment and the writ are both those of the Supreme Court, and that the Mofussil Law, relied on by the Lower Court, is a mere *lex fori*, which is no bar to the application of the English Law and cannot vary or control it. But the principles which we shall apply would, we think, equally apply, had the judgment-debtor and the purchasers been of pure English blood.

The ruling of the learned Chief Justice would then seem to be opposed to the above view, where, a little further on, he says "the right of entry" (as in the present case before us) "is a thing to be exercised out of Court and locally, and it or its extinction is not a part of the law of procedure, but a part of the law of real property—a part of the English Law, which English Law recognises and embraces all local laws and customs which extend to the matter;" and then the learned Chief Justice says that this doctrine is no new doctrine with him, but was recognised in his judgment of Musleah *vs.* Musleah already referred to, and in Storm *vs.* Humfray. The Chief Justice then finally ruled that the Supreme Court was right in taking judicial notice of the Regulations and of the highest Court of the East India Company.

Mr. Justice Colvile followed in the same course and said that, in suits in which the subject was immoveable property, the authority of all scientific jurists had held that the law of the place in which the property is situated, if different from the law of the *forum* in which the question is tried, must prevail over the latter on a question of limitation or prescription. We must observe, further, that the decision which was arrived at by Chief Justice Colvile and Sir Arthur Buller on a rehearing of the case of Musleah *vs.* Musleah (Boulnois, page 235) in no way alters or invalidates the principles declared in the case of Sib Chunder Doss. The decision come to on the re-hearing of the Musleah suit was that, *because* there was no law, real or written, or judgment made, which prescribed the course of succession of lands in the Mofussil held by a Jew dying in Calcutta, the English Law of Inheritance must prevail. But in the present appeal there is a law applicable to alienations and to the power of creditors to follow the property of their debtors, a law, too, well known and fully recognised; and we cannot doubt that this is precisely one of those local laws and customs as to immoveable estates which would, in the opinion of both the learned Chief Justices Sir L. Peel and Sir J. Colvile, have prevailed so as to vary and control the English Law on the subject.

Bearing in mind, then, that the case in which the above full, lucid, and excellent judgments were delivered, had reference to property in which Hindoos were concerned, and that the point practically decided was that the period of 12 years' prescription derived from the Regulations, and not the prescription of twenty years claimed and allowed for the English Law, was to be the guide, we still think that we can apply those principal to the case before us, and that we should not be

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justified in deciding it on any other grounds than those so conclusively established in that decision. We hold that we could not be right in ruling that the law of the Mofussil Court was a mere law of procedure, or that it could be viewed in any other light than the *lex rei sitæ*, which, it is fully admitted, alone can govern such questions. Indeed, the principles on which the Chief Justices proceeded, and which we shall now apply, are sufficiently obvious. The law which in the Mofussil enables creditors, by having recourse to certain processes, to follow the property of their debtors, has been repeatedly enunciated and laid down by the highest Court of the Company. It is based on considerations drawn from the character of the law suits instituted in Courts in the interior, and from the habits and dealings of the people. It is, as already observed, a law well known and appreciated. It would be in the highest degree unfair and inconvenient that *bonâ fide* purchasers, or those who take by gift or bequest, in good faith and in many instances for valuable consideration under laws with the effect of which they are perfectly familiar, should be liable to be disturbed in their possession by the operation of other laws of the scope and existence of which they could have no sort of knowledge. The introduction of such a doctrine, for which we find no warrant in the precedents before us, but the very reverse could only have the effect of producing confusion and doubt, and all the long train of positive evils to which uncertainty of tenure would materially expose owners of property, vendors and purchasers, executors and trustees.

On the other hand there can be no hardship to purchasers at Sheriff's sales, such as the plaintiffs in the present case, who in such speculations must be specially required to use the warning applicable to all purchasers whatever, if they are required to make themselves acquainted with the laws which govern the property where the thing lies which they purchase, and with which at sometime or other they must become familiar.

We are, therefore, quite certain that, while the judgments alluded to authorise and embolden us to take this view of the arguments, no judgment of a contrary tendency has been cited, while the principles on which it is based seem to us equally consistent with justice and with equity, and with that confidence in the security of formal transfers, untainted with fraud or collusion, which it is the object of all laws and of all judicial decisions to generate and to protect.

In this view we need not decide the other questions raised and argued before us as briefly noticed in this judgment, though we think that the respondents might have had a further defence to the actions set up on account of the abatement of the original writ, and by reason of the failure of the purchasers to observe fully the whole course of procedure prescribed for such writs in the books and orders cited to us. We content ourselves, however, on the principle above laid down, *viz.* that the law of the Mofussil is the *lex rei sitæ*, and that it controls or modifies the English Law as to execution and delivery, in affirming the decision of the Lower Courts and in dismissing both these appeals with costs.

The 25th April 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Mortgage (prior to Regulation XVII. 1806)—Redemption.

Case No. 2163 of 1863.

Special Appeal from a decision passed by the Judge of Sarun, dated the 21st April 1863, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 12th February 1862.

Mussamut Beebee Ruhmun (Plaintiff) *Appellant,*

versus

Sheikh Shumsooddeen Hyder and others (Defendants) *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Unnoda Persaud Banerjee for Respondents.

Where the time fixed for payment of a mortgage in the nature of a *bye-bil-wuffa* was the end of 1802, and there was no allegation of tender or deposit of the money prior to that date,—HELD that the mortgagor had, under Regulation I. 1798, lost his right of redemption, and that the benefit of Regulation XVII. 1806 could not be applied to mortgages made prior to the passing of that enactment.

Steer, J.—THIS is a suit to redeem a mortgage made in the year 1800.

It is allowed that the mortgage was in the nature of a bye-bil-wuffa, that is to say, a mortgage with conditional sale. It is also admitted that the fixed time for payment was the end of 1802, and there is no allegation that, prior to that date, any tender or deposit of the money borrowed was made.

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The Judge has held that the plaintiff, by not paying the debt on or before the fixed date for payment, has, under Regulation I of 1798, lost his right of redemption ; and that, according to the construction of the Sudder Court No. 672, the benefit of Regulation XVII of 1806 could not be applied to mortgages made prior to the passing of that enactment. He also held that the deed of sale of the 11th November 1860, executed by the mortgagee to a third party, was not open to the construction contended for, and that it was not evidence that the conditional sale had not then become absolute.

We think the Judge right in his law and in his construction, and we dismiss the special appeal with costs.

The 26th April 1864.

Present :

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Mortgage—Redemption.

Case No. 2375 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of 24-Pergunnahs, dated the 24th February 1863, *reversing a decision passed by the Moonsiff of that District, dated the 28th February* 1862.

Moonshee Abdool Huq and others (Plaintiffs) *Appellants,*

versus

Mussamut Myah Bewah and others (Defendants) *Respondents.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Kally Kishen Sein for Respondents.

The payment, by order of the Judge, into the Collector's treasury before the expiration of the year of grace, of a debt due to a mortgagee, was held to be a deposit in Court entitling the borrower to redeem.

Steer, J.—There is no ground whatever for a special appeal in this case. The debt due to the mortgagee was paid by orders of the Judge into the Collector's treasury before the expiration of the year of grace, and this was a deposit in Court entitling the borrower to redeem. The special appeal is dismissed with costs.

The 26th April 1864.

Present :

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Appeal—Error—Stamp Duty.

Case No. 2597 of 1863.

Special Appeal from a decision passed by the Judge of Sarun, dated the 22nd June 1863, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the 18th September* 1862.

Mr. G. E. F. Curness (Plaintiff) *Appellant,*

versus

Sheochurn Sahoo (Defendant) *Respondent.*

Mr. W. Mirfield for Appellant.

Mr. R. T. Allan for Respondent.

No appeal lies, under Section 350 Act VIII of 1859, against a decision on the ground that the Court admitted a document insufficiently stamped. According to Clause 1 Section 17 Act X of 1860, the document may be received on payment into Court of the proper amount of stamp duty to be determined by the Court.

Levinge, J.—The appeal in this case is identical with those in Appeals Nos. 2595-2596.

From the record it appears that the Judge of Sarun passed his judgment in this case ruling all three appeals.

The plaint is brought by the endorser against the maker on an unstamped document styled in the plaint a "bazaar chittah," and dated the 4th September 1860, to recover 978 rupees 12 annas. Some difficulty appears to have been felt by the Judge as to the true nature of the document sued on, whether it should be treated as a hoondee, a promissory note, or a bond. It has been treated in argument before us by Mr. Allan for the respondent, and Mr. Mirfield for the appellant, as a promissory note payable on demand, and that appears to be the true nature of the document. The Court of first instance gave to the plaintiff a decree in this as well as in the other two suits.

From this decree the defendant appealed, and, among other grounds, took the objection in all three suits "that the chittah should have been stamped." The Lower Appellate Court has ruled in favor of the defendant's objection, and without deciding the numerous issues raised by the appellant below as to the merits of the decision of the first Court, has, on this objection, dismissed the plaintiff's suit.

It is argued in special appeal before us, by the plaintiff's pleader, that no stamp

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was necessary, inasmuch as the Act first passed requiring promissory notes to be stamped came into force on 1st October 1860, being after the date of the note sued on; and that the operation of that Act was subsequently postponed until the 1st January 1861 by the Act XL of 1860.

However, in this appeal, we decline to go into that question. We are of opinion that the Judge should have gone into the merits of this appeal, and not decided the suit on the technical objection taken. The 350th Section of Act VIII of 1859 expressly declares "that *no decree* shall be *reversed* or modified, nor shall any case be remanded to the Lower Court, on account of any *error*, defect, or irregularity, either in the decision or in any interlocutory order passed in the suit *not affecting the merits of the case.*" We are of opinion that, even supposing the document required a stamp according to the Stamp Law then in force, no appeal lay against the decision of the Court of first instance on that point, although that Court may be in error in the determination it has come to on the preliminary objection taken to the admissibility of the document without a proper stamp being attached to it; for such error of judgment in no wise affects the merits of the matter in dispute in the action between the parties. We would also refer to the provisions of Act X of 1860 Section 17 Clause 1, which declares that Civil Courts may receive in evidence any instrument not bearing the stamp prescribed by that Act on payment into Court of the proper amount of stamp duty, to be determined by the Court *whose decision on the point shall be final.* It would be a great injustice to a suitor after a Court has ruled that a document requires no stamp and has admitted it, and the suit has gone on, and the plaintiff has obtained a decree on the merits, that the judgment was to be reversed on a technical objection and for an error of the Judge. The Lower Appellate Court seems to have wholly overlooked the above provisions of the law and the injustice of dismissing the plaintiff's suit on such a technical objection, particularly, as it appears from the Judge's own decision that the plaintiff offered to lodge in the Court of first instance such amount of stamp duty as that Court should decide to be requisite. But the Court of first instance declined to take the deposit on the ground that no stamp was necessary.

On this Court pointing out to Mr. Allan the objection to the right of the Lower Appellate Court entertaining the appeal on the score of a supposed error of the first Court in the view it took of the necessity for a stamp on this note, he referred this Court to a decision of the late Sudder Court dated the 30th April 1855; and in that case it will be found that the majority of the Court held that, under the provisions of Act IX of 1854, the Appellate Court is barred from taking cognizance of a breach of the stamp laws, when the defect is one not productive of injury to either party. Mr. Allan attempts to distinguish that case from the present, inasmuch as in that case it was stated that the objection taken in appeal was not urged in the Lower Court. But it will be seen, the Court did not decide the point for that reason, but purely on the ground that the defect was not prejudicial to the rights of either party.

We, accordingly, remand this case to the Lower Appellate Court, with directions to the Judge to try this appeal upon its merits, and to decide accordingly. The special appellant is entitled to his costs of this special appeal, which are accordingly decreed to him.

The 26th April 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Mahomedan Law—Gifts without seisin—Rule of equity and good conscience.

Case No. 2431 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Rungpore, dated the 4th June 1863, affirming a decision passed by the Moonsiff of that District, dated the 23rd December 1862.

Zohorooddeen Sirdar (Defendant) *Appellant,*

versus

Baharoollah Sircar (Plaintiff) *Respondent.*

Baboo Greeja Sunker Mozoomdar and *Moulvie Murhumut Hossein* for Appellant.

Baboos Sreenath Doss and *Dwarkanath Mitter* for Respondent.

According to Mahomedan Law, a gift is invalid where the donor is to remain in possession during his life-time

The application to Mahomedans of their own laws in cases other than those coming under the denomination of inheritance, marriage, and caste, (*e. g.* in case of gifts) is the administering of justice according to equity and good conscience.

Steer, J.—THE plaintiff, averring that Mahlab Beebee has made a hibba in his favor, sues for confirmation of his right and

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title to the property in suit under that instrument. He further seeks to set aside an alleged sale of two jotes pleaded by the defendant Zahoor Sirdar.

It appears that Mahlab Beebee admits the hibba and denies the sale.

Both the Courts below have held the sale to the defendant Zahoor Sirdar not to be proved, and they, accordingly, set aside the sale, and confirm the plaintiff's title under the hibba.

Zahoor Sirdar appeals specially, and he urges that a hibba without possession is invalid, and the plaintiff has no right of action.

We find that the deed of hibba stipulates that the donor is to remain in possession during her life. Such a condition in the hibba makes it invalid under the Mahomedan Law, Hedya Vol. 3 page 300; and the same authority, Vol. 3, page 130, further lays it down as a rule of law, that a gift which is not to take effect till the death of the donor is null and void.

Therefore, in this case, if the Court were to decree the suit of the plaintiff, it would be to declare his title good upon an instrument which the law of his sect declares to be null and void. This the Court cannot do.

It is contended by the pleader for the plaintiff, special respondent, that the Mahomedan Law is not applicable to a contract of the nature before the Court; that, according to Section 15 Regulation IV of 1793, it is only on questions of inheritance, marriage, and caste, that the Court is called upon to decide in conformity to the Mahomedan Law; and that the present matter before the Court, not being one of the nature above expressed, is to be decided by the ordinary rule of equity and good conscience.

In answer to this, it may be remarked that the Courts of this country have invariably applied in practice the Mahomedan Law to a variety of cases other than those coming under the denomination of inheritance, marriage, and caste, and, even if immemorial and recognized practice did not legalize the action of the Courts, it cannot be said that, when this Court administers to Mahomedans their own laws, they do otherwise than administer justice according to equity and good conscience.

We, accordingly, decree the special appeal, and reverse the judgment of the Lower Courts, with costs and interest.

The 27th April 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Evidence—Copies—Admission.

Case No. 2568 of 1863.

Special Appeal from a decision passed by the Judge of Sarun, dated the 27th May 1863, reversing a decision of the Principal Sudder Ameen of that District, dated the 26th May 1862.

Mussamut Beebee Kurum and others (Plaintiffs) *Appellants,*

versus

Ruttun Bhuggut, chela and heir of Mohunt Singh (Defendant) *Respondent.*

Baboo Kishen Sukha Mookerjee for Appellants.

Baboo Mirtunjoy Mookerjee for Respondent.

A copy of a disputed deed cannot be taken as evidence without proof that the original is out of the power of the party producing the copy. The admission of the existence of the original is not tantamount to an admission of the correctness of the copy.

Steer, J.—The plaintiffs sued on an ikrarnamah, and did not produce the original but a copy, and they made no attempt to account for the original. The Judge held that the secondary evidence of the ikrarnamah, when the original has not been accounted for, could not be received, and dismissed the plaintiff's suit.

In special appeal it is contended that a copy was enough, as the defendant has admitted the existence of the ikrar; but the admitting of the existence of an ikrar is not the same thing as admitting that the copy of the ikrar filed is a correct copy. In fact, the ikrar is said in the answer to be a prepared document, and, therefore, it was the more necessary that the deed in original should be produced. The Judge has, therefore, rightly held that a copy of a disputed deed cannot be taken as evidence without proof that the original is out of the power of the plaintiff.

There is no ground for special appeal, and we dismiss it with costs.

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The 27th April 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Pleadings—Bigh-brito tenure—Right of occupancy.

Case No. 2550 of 1863.

Special Appeal from a decision passed by the Judge of Sarun, dated the 30th June 1863, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 22nd December 1862.

Maharajah Woodoy Narain (Plaintiff) *Appellant,*

versus

Durriaho Roy and others (Defendants) *Respondents.*

Mr. G. C. Paul and *Baboo Kalee Mohun Bose* for Appellant.

Baboos Onookool Chunder Mookerjee and *Kishen Succa Mookerjee* for Respondents.

Where a defendant set up a *bigh-brito* tenure as his title to certain land, he was not allowed, on failure of proof of that title, to set up another title not depending on any deed, but derived by a 12 years' occupancy of the land as a ryot within the meaning of Section 6 Act X of 1859.

Steer, J.—THE plaintiff gave a mortgage of his property to a third party. He paid the mortgage off, but the defendant will not allow him to take possession. The plaintiff says the defendant is simply the lessee under the late mortgagee. The defendant says he holds the lands as a bigh-brito tenure.

The first Court found that the defendant did not hold under the bigh-brito tenure, but was simply a sub-lessee and was bound, when the superior lease terminated, to give up possession to the landlord.

The Judge does not say whether he finds the bigh-brito tenure proved or not; but he considers that, as defendant has been in possession for more than 12 years, he cannot be ousted. He, accordingly, reverses the judgment of the Principal Sudder Ameen, and dismisses the plaintiff's suit with costs.

If the defendant is a sub-lessee, it is plain he cannot sustain a claim to continue in possession when the lease of his lessor has been brought to a close. Nor has he any right under the bigh-brito claim; for it has been found in a former suit that there never was any such tenure.

But it is contended by the pleader for the defendant that, whether his title as a holder of a bigh-brito tenure is proved or not, he is entitled to be maintained in possession, if he is able to prove that he has occupied the lands for more than 12 years.

We think that, where the defendant has set up a bigh-brito tenure as his title to the lands, he must stand or fall upon that title. He cannot be allowed upon the failure of proof of that title to say that he will adopt another title—a title depending, not on any deed, but derived by a 12 years' occupancy of the land as a ryot within the meaning of Section 6 Act X of 1859; for this was not his case, and he cannot set up one case and prove another.

In this view we reverse the judgment of the Judge, and decree the special appeal with costs and interest.

The 27th April 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Confirmation of possession — Proof of possession—Attesting witnesses.

Case No. 2683 of 1863.

Special Appeal from a decision passed by the Judge of Sarun, dated the 30th June 1863, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 29th November 1862.

Agum Misra (Defendant) *Appellant,*

versus

Pullukdharee Misra and others (Plaintiffs) *Respondents.*

Baboos Kishen Succa Mookerjee and *Debendro Narain Bose* for Appellant.

Baboos Chunder Madhub Ghose and *Dwarkanath Mitter* for Respondents.

There can be no decree for the plaintiff in a suit for confirmation of possession without proof of his actual possession.

Where an attesting witness is unable to write and either makes a mark or has his name written for him in a deed, the satisfactory or unsatisfactory style of execution of the attestation cannot invalidate the deed.

Levinge, J.—THIS is a special appeal from the judgment of Mr. Brodhurst, Judge of Sarun. After argument and hearing fully all that can be said in support of the judgment, we feel constrained to remand this case to the Judge for a full determination, as it is plain, from the objections taken on this special appeal, that the Judge has reversed the finding of the Court of first instance on untenable grounds and for insufficient reasons. The first Court found that the two defendants Sungat and Agum, who claim an

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8 anna share in the property in this suit were heirs of Proboo Dutt. If Proboo Dutt left no heirs, then these two defendants have no *locus standi* in Court. But the first Court found, on what *primâ facie* appears to be good evidence, that Proboo left the two defendants Sungat Misra and Agum Misra, his heirs, him surviving: whereas, the Judge on appeal, not noticing the apparently satisfactory grounds stated by the first Court, gives the following reason which is purely conjectural for holding that Proboo died without heirs:—"With respect to "the heirs of Proboo, when at the settlement "that was made 24 years ago with Naga "Misra, no objection was advanced by any "person claiming to be heir of Proboo Dutt "Misra, notwithstanding the usual notice "was issued, *the only conclusion to be ar-* "*rived at is that the present claimants to* "*his property are pretenders, and not heirs* "*in reality.* Their names are not mention-"ed in the Collectorate chellans, whereas "the plaintiffs' are." We must contrast the above reasons with the judgment of the Principal Sudder Ameen on this issue. "The point to be determined in this suit "is whether Agum Misra and Sungat "Misra are descended from Proboo Dutt "Misra, and whether they hold possession of "8 annas in suit? There is no doubt that "Agum Misra is the son of Proboo Dutt "Misra, deceased, and that he and Sungat "Misra, his nephew, hold possession of the "property in suit; because from the report "of Jhoomuk Lall, Naib Nazir of the Col-"lector's Office, dated 8th February 1862, "*and the depositions of credible witnesses* "*taken in this Court (many of whom are* "*relatives of both parties and puttedars* "*of the mouzahs in suit)*, it has been satis-"factorily proved that Agum Misra and "Sungat Misra are the son and grandson of "Proboo Dutt Misra, deceased, and that they "hold possession of the property in suit "from a long time. Besides this, the pottahs "filed in the suit of Mussamut Sunder Koer "*versus* Chuttoo Dharee Misra and others, "defendants, and the depositions of ryots "and cultivators taken in that suit, prove the "possession of plaintiffs and Agum Misra and "others, defendants, with regard to the "property in suit."

Now, we must observe that on purely conjectural grounds to find the issue against the persons decided on legal evidence by another Court to be Proboo's heirs cannot be permitted to stand. The first Court found the issue in favor of the defendants after examining a large body of witnesses, relatives, and others.

It appears to us that the finding of the Judge was not only against evidence, but was a finding without any evidence to support it, and can, therefore, be dealt with by this Court on special appeal.

We wish also to call the attention of the Judge to this fact, that the matters in dispute in this suit involve the question of title to an alleged joint and undivided Hindoo estate. These two defendants, Sungat and Agum, claim to be heirs of Proboo Dutt, Agum as being his son, and Sungat his grandson, offspring of a deceased son, Hurkoo. Naga, who is alleged to have obtained a settlement 24 years ago, was the brother of Proboo, and both admittedly inherited each an 8 anna share of the ancestral property involved in this suit. If Naga managed the property, what more natural or more consonant with the known habits of the people than that his name should have been the one used in the settlement of the joint family estate: and, therefore, we would attach little, if any, weight to this fact even if, on balancing the evidence, *any evidence* was given by the plaintiffs to show that Proboo left *no sons*. But, as the evidence is all one way, *viz.* on the side of the defendants that he did, we are at a loss to see how the Judge came to the conclusion he did.

Again, another very forcible objection is taken by the appellants to the soundness of the judgment appealed against. The suit is for the *confirmation of the possession of the plaintiffs in the land comprised in it*, and which embraces the 8 anna share stated to have descended from Proboo Dutt to his alleged heirs, the defendants Sungat and Agum. The Court of first instance found that these two defendants were *in possession* of that share, and, therefore, rightly dismissed the plaintiffs' claim; but the Judge, finding against these two defendants as not being Proboo's heirs, and for the reasons we have already shown, decreed for the plaintiff in a suit *for confirmation of possession* without finding in his judgment the essential fact that the plaintiffs were in *actual possession*. And here we may say that, even if the plaintiffs had been able to shew that they, or their ancestor Naga, was or had been in possession of the 8 anna share enjoyed by Proboo in his life-time, that fact alone would be no more proof that Naga or they were exclusively entitled to have their *title confirmed* against the defendants than the fact of the settlement being made 24 years ago with

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Naga, was clear proof that Naga alone had any title to these lands. The possession of Naga might have been the possession of the manager, and the possession of the managing member of a joint Hindoo family is not adverse possession against the other members. The Court of first instance uses this argument with force, and that Court is clearly right in point of law in relying on that position. It is clear from the judgment appealed against that the Court has *confirmed the possession* of the plaintiffs without any proof of *their possession*, and, therefore, it is a decree without evidence to support it: it would also appear to be *against evidence*, inasmuch as the first Court found on very good evidence an actual possession by the defendants Sungat and Agum.

The last matter we have to refer to is the finding of the Judge against the validity of the ikrarnamah as binding on the plaintiffs. It is stated by the vakeels for the appellants, as well as by the vakeels for Arrowla Koer, and not contradicted by the vakeels of the respondents, that the defendants Chuttoo Dharee and Brijo Lall, in conjunction with the plaintiffs, executed this deed in favor of Arrowla Koer, granting to her the beneficial enjoyment of two mouzahs in lieu of maintenance. As these defendants admit to be bound by the deed, and as there appears to be good consideration for it, and as the first Court found in favor of its entire validity, that finding should not be disturbed without good reasons. The following are the words of the Judge and his reasons for disturbing this finding :—

"Next as to the ikrarnamah, the original "deed was produced, but it does not bear "any mark of registry or of the Cazee's seal, "and the witnesses brought to prove it were "unable to write, and, therefore, *could not* "*attest it satisfactorily*. I can, therefore, "place no reliance on this document."

The above are his only recorded reasons for setting aside the deed. We have to remark that no law now exists, or did exist at the date of this ikrarnamah, declaring that registry was essential to the validity of that ikrarnamah. The absence or presence of the Cazee's seal cannot be allowed to turn the scale against the validity of this instrument in a Court of Justice. As regards the Judge's remark that "the witnesses "brought to prove it were unable to write "and, therefore, could not attest it *satisfac*-"*torily*," the Court can only say that it does not quite understand this further reason for holding the ikrarnamah invalid ; nor can the Court see that it affords sufficient grounds, in point of law, for reversing the able and elaborate judgment of the first Court. If the witnesses swore they signed their names in full, and it was proved they could not write their names at all, then that would be good ground for disbelieving them ; but if they wrote imperfectly or were marksmen merely, and had their names written for them, then the "*satisfactory*" or "unsatisfactory" style of execution should not invalidate the deed, because the mode of execution of the ikrarnamah did not quite come up to the standard of execution considered by the Judge as necessary and essential to accompany the attestation of family deeds conveying a temporary interest in land to a female entitled to receive maintenance from the alleged executing parties ; particularly when several parties to the deed admit to be bound by it, and whose interests are much and prejudicially affected by it.

We, therefore, think the Judge's reasons unsatisfactory for holding this deed not proved ; and as we have to remand the case, we have to call on him to re-investigate the evidence touching the completion and execution of the ikrarnamah. The case must, therefore, go back to the Judge for a full and complete re-consideration on all points, in order that another, and we hope, a more complete and legal, judgment may be recorded.

The 27th April 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Mortgage — Regulation XVII. 1806 (date of operation in Chupra) — Waivor.

Case No. 2418 of 1863.

Special Appeal from a decision passed by Mr. W. T. Tucker, Officiating Additional Judge of Sarun, dated the 12th May 1863, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 5th April 1862.

Shaikh Bukshush Hossein and others (Plaintiffs) *Appellants,*

versus

Bibee Fuzeeloonissa and others (Defendants) *Respondents.*

Mr. A. F. Lingham for Appellants.

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Mr. R. E. Twidale, Moonshee Ameer Ali, and *Baboos Mohesh Chunder Chowdhry* and *Khettur Mohun Mookerjee* for Respondents.

Regulation XVII. 1806 came into operation in the District of Chupra on the 11th September 1806.

Indulgence or waivor of rights between a mortgagee and mortgagor cannot be carried beyond those parties.

Levinge, J.—THE plaintiffs sued for the possession of certain lands which had been mortgaged, and claimed a right of redemption. The Lower Courts have held the plaintiffs' rights to be barred by lapse of time.

There are two denominations of lands comprised in this suit, and the subject of distinct mortgages, *viz.*, Mukdoompore and Seetulpore. The former was mortgaged by deed dated the 30th November 1801, for 2,291 rupees, the principal being payable on the 28th September 1806, in default of which the title in the mortgaged premises became on that day absolutely vested in the mortgagee. Seetulpore was mortgaged on the 6th day of September 1801 for rupees 3,001, payable on the 19th day of September 1804, subject to like conditions on that day. It has been shown on the record that the mortgagor of both lands was Assudoollah ; but, under a suit instituted in the year 1803 for a partition, his share in the mortgaged premises was by a final decree in 1808 found to be only 15 sahams out of 45. In the year 1810, and under an ikrarnamah dated the 25th May of that year, the mortgagee gave to Assudoollah one further year's time to redeem the mortgaged premises. The above are all the essential matters necessary to mention.

We consider the Lower Courts were wrong in holding that the plaintiffs had no right to redeem. We are of opinion that the Lower Courts were wrong as regards the mortgage of Mukdoompore, inasmuch as the mortgagee's title was not to become absolute until the 28th day of September 1806, and Regulation XVII of 1806 had before that date, *viz.* on the 11th September 1806, come into operation and altered the absolute and unconditional effect of the deed. The Lower Courts have held that the mortgagee's rights were not to be affected by the provisions of that Regulation, inasmuch as it had not been shown that the Regulation had been promulgated in the District of Chupra before the 28th day of September 1806. But, as the Regulation contains no provision of the kind, we must give to it its legal effect from the 11th September 1806, and hold that the plaintiffs are not barred of their right to redeem.

As regards the other denomination, we consider both Courts are right in holding that the mortgagors were barred. The title of the mortgagee became absolute and irredeemable on the 19th day of September 1804. It has been contended in special appeal that the effect of the mortgagee giving time to Assudoollah in 1810, had the effect of altering the plaintiff's position and of annulling the operation of the mortgage deed. But it is to be remembered that Assudoollah had only in 1810 a 15 saham share ; so that, without passing any opinion one way or other on the legal effect of the ikrarnamah on the share represented in the mortgaged lands by Assudoollah, we are clearly of opinion that indulgence or waivor of rights between the mortgagee and Assudoollah cannot be carried beyond those parties, or in any affect the position of the plaintiffs who represented the remaining interest in the mortgaged premises on the 19th day of September 1804, being the day the mortgagee's interest became absolute and unconditional, and this, although Assudoollah undertook in the year 1801 to mortgage the whole of Seetulpore. We, therefore, reverse so much of the decree below as shuts out the plaintiffs from redeeming their interests in the mortgaged lands of Mukdoompore, and confirm the decree as to so much as declares their interests extinguished in Seetulpore and the lands comprised in the mortgage of the 6th September 1801.

We remand this suit as regards the mortgage of Mukdoompore for adjudication and further investigation, both parties to bear the costs of the special appeal in proportion to the amounts decreed.

The 28th April 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonauth Pundit, *Judges.*

Right of suit (against trustee).

Case No. 2062 of 1863.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 23rd April 1863, reversing a decree of the Principal Sudder Ameen of that District, dated the 28th November 1861.

Juggobundhoo Coondoo (Plaintiff) *Appellant,*

versus

Nil Comul Surmah and others (Defendants) *Respondents.*

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Baboo Onookool Chunder Mookerjee for Appellant.

Baboos Kally Mohun Doss and *Hem Chunder Banerjee* for Respondents.

If the money due on a bond belonged to *A*, and *B* the nominal plaintiff in a suit on the bond was a trustee for him,—HELD that *A*'s son may sue to get the benefit of the decree obtained by *B*.

Morgan, J.—THE precedents referred to by the Lower Appellate Court are not opposed to the plaintiff's right of suit in a case like the present. If the money due on the bond really belonged to Nobin Chunder Coondoo, and Cheytun Coondoo Paul, the nominal plaintiff in the suit on the bond, was a trustee for him, the son of Nobin Coondoo may bring this suit to get the benefit of the decree obtained by Cheytun Coondoo Paul. We think the decree of the Court of first instance correct. In execution of that decree, all questions arising concerning the amount now due under the former decree, or whether the same has been satisfied in part or wholly, or to what extent, may be settled.

We allow this appeal, and reverse the judgment of the Lower Appellate Court with costs.

The 29th April 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Jurisdiction—Section 14 Act VIII of 1859.

Case No. 494 of 1863.

Regular Appeal from a decision passed by Moulvie Iradut Ali Khan, Principal Sudder Ameen of Shahabad, dated the 21st July 1863.

Puhlwan Singh and others (Defendants) *Appellants,*

versus

Maharajah Mohessur Buksh Singh (Plaintiff) *Respondent.*

Mr. G. C. Paul and *Baboos Unnoda Pershad Banerjee* and *Onookool Chunder Mookerjee* for Appellants.

Mr. R. V. Doyne, Moonshee Ameer Ali and *Baboo Dwarkanath Mitter* for Respondent.

Suit laid at rupees 2,40,799-10-9.

Where the Collector of Ghazeepore, under Act I of 1847 the operation of which is confined to the territories subject to the N. W. P., tried a dispute as to the boundaries of two zillahs, one within and the other without the N. W. P., he was held to have acted without jurisdiction and therefore not to be a competent authority within the meaning of Section 14 Act VIII of 1859.

Kemp, J.—THIS is an appeal from the decision of the Principal Sudder Ameen of Shahabad, dated the 21st July 1863.

The defendants in the Court below appeal. The plaintiff, Maharajah Mohessur Buksh Singh of Doomraon, sued for possession of 2,967 and 10 biswahs of land alleging them to be alluvial lands which had gradually accreted to his villages, Karatar Burada, Moholee, and Rampore, Pergunnah Bhojpore, and that he was entitled thereto under the provisions of Clause 1 Section 4 Regulation XI of 1825. The suit was valued at rupees 2,40.799-10-9. The date of ouster was alleged to be on the 13th March 1860.

The defendants, Baboo Meghburun Singh and others, answer briefly as follows:—That the suit of the plaintiff is barred under the special Law of Limitations, Act XIII of 1848, inasmuch as the defendants were allowed by the Revenue authorities to continue in possession of the disputed land under proceedings dated the 5th August 1841; and that, as the suit of the plaintiff is obviously to reverse those proceedings and was instituted on the 30th December 1861, it is clearly beyond time under the above Act.

On the merits the defendants answer that the disputed lands were never in the possession of the plaintiff; that, in 1232 Fuslee, a perpetual settlement of the Mehal Deara Sheopore, Pergunnah Bulya in Zillah Ghazeepore was made by the Revenue authorities with the ancestor of the defendants, subject to certain conditions, *viz.* that, in case of increment or diluvion within 10 per cent., there was to be neither enhancement nor abatement of the jumma payable by the defendants; that any excess over that percentage would give the parties a right to enhance or to claim abatement of the jumma, as the case might be; that the lands settled with the defendants were measured every five years to ascertain whether they had increased or decreased in area beyond the percentage above noted.

The answer proceeds to describe the course of the flow of the river Ganges at various periods ranging from 1238 Fuslee to 1266 Fuslee; that, notwithstanding the changes in the course of the river, the lands of the mehal settled with the defendants by the Revenue authorities remained capable of identification, inasmuch as the river Ganges made sudden irruptions cutting through the estate of the defendants, but, at the same time, not destroying its identity; that the provisions of Clause 1 Section 4 Regulation XI of 1825 were, therefore, inapplicable; that,

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even admitting the false averment of the plaintiff that the land in dispute had formed by gradual recession of the river Ganges, the defendants would be entitled to it under the Law of Alluvion ; that the amount claimed as mesne profits was grossly exaggerated.

A second written statement was filed by the defendants, and this raised a fresh plea in bar, *viz.* that the land in dispute was situated in Zillah Ghazeepore, and that this fact had been determined by competent authority ; that, under these circumstances, the suit of the plaintiff could not be entertained under the provisions of Section 14 Act VIII of 1859.

The Principal Sudder Ameen, Moulvie Irudut Ali, after visiting the disputed lands and directing a local enquiry to be made by a first class Ameen, decided that the suit of the plaintiff was not barred by the special Limitation Law Act XIII of 1848. With reference to the plea that the plaint must be rejected under the provisions of Section 14 Act VIII of 1859, he observed that the question could not be decided without entering into the merits of the case. On the merits he was of opinion that the lands in dispute were gradual accretions on to the estate of the plaintiff in Zillah Shahabad, and that the plaintiff was entitled to a decree for possession. With regard to mesne profits, he directed that a local enquiry to ascertain the proper amount for which the defendants were liable was to be made in the execution stage. With reference to the plea under Section 14 Act VIII of 1859, that the Court had no jurisdiction, he overruled it, holding that the disputed lands appertained to the plaintiff's estate in Zillah Shahabad, and that, therefore, the suit could be sustained.

In appeal the learned Counsel, Mr. Paul, for the appellants, makes the first point for his client, that this suit was not cognizable by the Principal Sudder Ameen of Shahabad. In support of his argument, the learned Counsel quoted Section 14 of Act VIII of 1859, Act I of 1847, and two decisions of this Court noted in the margin.

Syud Lotf Ali and others Defendants, Appellants, 22nd July 1863.
Hura Nundun Lal Sahoo, 5th December 1862.

We are clearly of opinion that the Principal Sudder Ameen of Shahabad had jurisdiction. The Collector of Zillah Ghazeepore, under the provisions of Act I of 1847, which Act is confined in its operation to the territories subject to the Government of the North-Western Provinces and does not extend to the Zillah of Shahabad, had no jurisdiction to try any suit which involved a dispute as to the boundaries of two zillahs, one within, and the other admittedly without, the North-Western Provinces. His jurisdiction in the matter of boundary disputes extended to such as might arise between two conterminous fields or estates within his own zillah. He had no authority to enlarge his own boundaries and to overstep his jurisdiction, so that, even admitting that he decided the question of the boundary as between the two districts, which he does not appear to have done, he was acting wholly without jurisdiction, and could not, therefore, be the competent authority contemplated by Section 14 Act VIII of 1859. We, therefore, find this issue, which we would observe was not raised in the first written statement of the defendants, the appellants, in favor of the plaintiff, the respondent.

Mr. Paul waives all argument on the question of whether the suit is barred under the special Law of Limitations, Act XIII of 1848, and proceeds to argue the appeals on the merits. The arguments of the learned Counsel were lengthy and most able. The substance of his contention appears to be that the lands in dispute are not gradual accretions, but are chukee lands, that is to say, lands falling within the purview of Clause 2 Section 4 Regulation XI of 1825, as lands that have been suddenly cut off from other lands settled with the defendants, but which are still capable of identification.

A map made by a Government Tehsildar in 1860 was submitted to the Court's inspection by Mr. Paul. This map professes to trace the various changes in the current of the river Ganges from 1232, when a settlement of the estate of Deara Sheopore was made with the defendants ; and the learned Counsel professed himself to be able to trace the position of the lands which had been suddenly separated from the remaining lands settled with his client at various times by the eccentricities of the said river, by comparing the numbers of the plots or daghs laid down in the map of 1860 with those of the settlement kusrah and other papers. He also referred us to a dukulnamah or receipt acknowledging possession, which it is alleged that the plaintiff filed in a suit in which he, as proprietor of a fractional share of the estate Deara Sheopore, obtained a decree against a ryot for possession of some 278 beegahs of land, and in which document certain daghs are mentioned, the numbers of which tally with

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the map of 1860. The learned Counsel also generally objected to the enquiry of the Ameen, and further contended that the Principal Sudder Ameen has not given sufficient attention to the old maps which shew that the irruptions of the river were sudden, and not that the river gradually receded causing alluvial lands to accrete. The learned Counsel sums up his argument by submitting two points for the consideration of the Court:—

1st.—Has the plaintiff proved that the land in dispute has gradually accreted to his estate, or does the land belong to the estate of the defendants, inasmuch as it has not gradually accreted, but has been separated from the main body of the estate settled with the defendants by sudden incursions of the river, leaving the lands cut off traceable?

2nd.—If the lands in dispute have gradually accreted, have they accreted wholly to the estate of the plaintiff, or to the estate of the defendants, or partly to one and partly to the other, and, if the latter, in what proportion?

This is a case in which the river Ganges has been more than usually capricious. There can be no question that this river is the boundary between the two Zillahs of Ghazeepore and Shahabad. From a survey map of 1857 obtained from the office of the Surveyor-General, we find that the Ganges is represented in that map as having cut off a large slice of land from Shahabad and given it to Ghazeepore. The plaintiff has unquestionably lost much land by the vagaries of the river, and it may be that his day to receive has arrived.

The defendants have, throughout the pleadings in the Court below, taken their stand on one consistent and perfectly intelligible principle. It is only in this Court that they have attempted to fall back in the event of failure on an alternative plea. Their contention below was that the disputed lands were not alluvial at all, but were what are called chukee lands; that these lands were included in the settlement made with them by the Ghazeepore Collector; and that the Ganges, though it cut through the mehal settled with them and changed its course several times, never destroyed the identity of the lands. Now, the map of 1860, which professes to show the different courses which the aforesaid river has taken from time to time, also shews certain numbers as of daghs or plots. If these plots could be identified by comparison with any reliable chittahs or other settlement proceedings, this map would be very strong, if not conclusive evidence in support of the defendants' theory of sudden irruption by the river without destruction of identity. But it is admitted that, on a reference to the Ghazeepore Revenue authorities, which was brought about by an application on the part of the plaintiff for copies of the kusrah and other measurement papers, no such papers exist; and it is, therefore, clear that the tehsildar, who prepared this map, could not have filled in the daghs on the face of it by comparison with any measurement papers. Indeed, the theory of identity by numbers is entirely destroyed by the acts and admissions of the defendants themselves; for we find them repeatedly petitioning the Collector for a remission of jumma on the score of total diluvion; and we also find a series of numbers of daghs given either in the body of these petitions or in lists attached thereto, which correspond with numbers marked down in the map of 1860. It is true that the learned Counsel for the defendants has attempted to neutralize the effect of this inconsistency by stating that the admissions in these petitions were false and made for a particular purpose, *viz.* to obtain a remission of jumma; but, if this be so, we cannot permit the defendants to take advantage of this, particularly as their statements to the Collector tally with the present state of things. The Ameen, who made a careful local enquiry, and who was examined at great length and cross-questioned by the parties, reports that the whole of the disputed land is alluvial land, and that there are no traces of former boundaries. The Principal Sudder Ameen, who visited the spot and remained there some time, found the statements and map of the Ameen to be perfectly correct; and he states that he has come to a deliberate conclusion from personal inspection of the disputed lands that they are alluvial lands which have gradually accreted to the estate of the plaintiff in Zillah Shahabad, and that all traces of the former lands have been obliterated. We cannot but accept this result of the enquiry as the correct result, and, as no distinct act of corruption or partiality on the part of the Ameen has been proved or even insinuated, his report, which has been tested by the Principal Sudder Ameen, and subjected to a strict cross-examination, may be accepted as reliable evidence under the provisions of Section 180 of the Code of Civil Procedure.

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We have, therefore, come to the conclusion that the river went through various changes of its channel at different times, but that these changes were gradual, and caused, as a natural consequence, alluvion; that these changes were not abrupt leaving lands capable of identification, for, if such had been the case, the beds of the river in its various changes of course would be still traceable on the spot, which is not the case.

With reference to the alternative plea taken by the learned Counsel for the defendants, we wish to make a few observations. If the defendants had stated their case honestly, and, while admitting that the lands were alluvial lands, had claimed them under the Alluvial Law, either wholly or in part, we should have been prepared to give them the full benefit of the provisions of Regulation XI of 1825; but, when we find them taking their stand upon a line of defence which sets up the special provisions of Clause 2 Section 4 Regulation XI of 1825, and denouncing the averments of the plaintiff, appellant, that the lands were of gradual formation as wholly false, we must hold them to their plea; and, as they have wholly failed to prove it, we dismiss the appeal with costs and interest, and affirm the decision of the Lower Court.

The 29th April 1864.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Hindoo Law of Inheritance — Adoption — Sister's daughter's son — Putrika Putra—Samanodakas.

Cases Nos. 426, 413 to 416, and 459 of 1863.

Regular Appeals from a decision passed by the Judge of Patna, dated the 21st May 1863.

Nursing Narain and others (Defendants) *Appellants,*

versus

Bhuttun Loll and others (Plaintiffs) *Respondents.*

Mr. C. Gregory, Baboos Sreenath Doss, Chunder Madhub Ghose, Debendro Narain Bose, and *Luckhy Churn Bose,* and *Moonshee Ameer Ali* for Appellants.

Mr. R. T. Allan, and *Baboos Dwarkanath Mitter, Unnoda Persad Banerjee, Onookool Chunder Mookerjee, Kissen Succa Mookerjee,* and *Oopendur Chunder Bose,* for Respondents.

According to Hindoo Law, a sister's daughter cannot become an "appointed daughter" or her son a "*putrika putra*"; nor is the adoption of a "*putrika putra*" valid in the present day.

"*Samanodakas*" (or persons allied by a common oblation of water) belonging to the "*gotra*" (or race or general family) of a deceased person are, according to Hindoo Law, sufficiently cognate to succeed to property in default of parties nearer of kin.

Glover, J.—These are all appeals from the same decision.

Plaintiffs sue as nearest of kin to one Lalla Holas Narayan for possession of certain mouzahs, malikana lands, and other property, by the determination of their heritable right, and by cancelment of various conveyances under which defendants hold. They also sue for the reversal of the summary order of the Judge of Patna passed under Regulation XIX of 1841.

It appears from the record that the original acquirer of the property in suit was Lalla Koshal Narayan, who adopted Holas Narayan, and bequeathed to him all his possessions. Holas Narayan married Hur Koowar, and died childless in 1827 A. D. The widow deceased on the 20th of November 1862, from which date the respondents, who admit Hur Koowar's life-interest in the property left by her husband, claim.

The defendants (appellants in this case) reply generally that Holas Narayan, during his life-time, adopted his niece (sister's daughter) Chuttur Koowar, on the understanding that, when she married and had issue, her son should be his (Holas Narayan's) adopted child. Chuttur Koowar is said to have been adopted in 1222 F. S., and to have married in 1225 F. S. She was then, as is usual in this country, a mere child, and her son Utulbeharee *alias* Nursingh Narayan, the principal defendant in this suit, was not born till 1236 F. S., about five years after Holas Narayan's death. They aver, also, that, from that date, Nursingh Narayan has been, both constructively through his guardian, and after he attained majority in 1847 A. D. actually, in possession of all the property of his adoptive father.

The other appellants claim various portions of the property by purchase, either from Hur Koowar, or from one or other of the representatives of Holas Narayan. In some cases, Utulbeharee is said to have been the vendor, in others, he and his mother together and in two, all three are said to have joined in the conveyance.

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The Judge found that the suit was not barred, as alleged, by the Statute of Limitations, and that the adoption was not a valid one. He considered that Hur Koowar was a trustee with a life-interest only, and powerless to alienate any part of her late husband's property except for certain necessary purposes. He, therefore, cancelled the sales executed by her, Chutturdaree and Utulbeharee, and decreed the case in favor of the plaintiff.

The points for consideration in this appeal are :—

(1.) Is the suit barred by the Statute of Limitations ?

(2.) Are the plaintiffs (respondents) in a position to sue as heirs of the deceased Holas Narayan ?

(3.) Was the adoption of Utulbeharee as a "putrika putra" valid ?

If these issues are found against the appellant Utulbeharee, it will be necessary to consider the *bona fides* of the different sales, the necessity of the alienations, and the right of the different vendors to sell.

On the 1*st* issue appellant urges that the respondents' cause of action was his (Utulbeharee's) adoption and succession to the property of Holas Narayan.) Appellant was born in 1829, obtained his majority in 1847, and has been all along in possession of the property. But it appears to us that the question of limitation turns altogether on the legality of Utulbeharee's adoption. If it be admitted that the "putrika putra" form of adoption is valid, and that Utulbeharee stood in that relation to the deceased Holas Narayan, no question of limitation could of course arise ; but if the adoption be not valid, then respondents' rights in Holas Narayan's property did not commence till the death of the widow Hur Koowar in 1862, in which case the respondents would be amply in time. The decision on this point, therefore, will follow that on the 3*rd* issue.

There is no finding on the 2*nd* issue in the Judge's decision ; but from the fact of both appellants and respondents having filed their genealogical trees, and from the evidence on the record, we presume that he took it into consideration ; and we find from these documents that, even admitting the appellant's "*kurseenamah*" as the correct one, the respondents are not further removed than the 7th or 8th degree of relationship from the deceased Holas ; so that, although they may not, perhaps, be *sapendas* ("near kinsmen, sharers of the undivided oblation"), in the exact sense of the term, they are clearly "*samanodakas*" ("allied by a common oblation of water"), belonging to the "gotra" (race or general family) of Holas Narayan, and, according to Hindoo Law, sufficiently cognate to succeed to property in default of parties nearer of kin (*vide* Colebrooke's Digest, Vol. III, p. 532).

With regard to the third point of law taken in this case, the respondents argue that, even admitting the truth of all the appellant's statements, they disclose no valid title *quoad* adoption under Hindoo Law.

The appellant's allegations on the subject of his adoption and succession to the property of Holas Narayan have already been recorded, and we proceed to consider the question of "title."

This would seem to divide itself into two heads :—.

(1).—Was such an adoption as the appellant's ever valid under the ancient Hindoo Law current in the provinces governed by the Mitakshara ? and

(2).—Is such an adoption valid at the present day ?

There is no doubt that, in ancient times, there were many legal substitutes for the sons of the body (ourās). Menu (Chapter 9, V. 180,) and Jugnyavalkya (Mitakshara, Chapter 1, Section 2)enumerate no less than twelve including the legitimate son of the body ; and the latter authority ranks the son of an appointed daughter ("putrika putra") next to the legitimate son, and equal to him. It is contended by the appellant in this case that a sister's daughter may be adopted under this authority, and become "an appointed daughter," and her son a "putrika putra"; but we do not see the slightest resemblance between the two cases. The daughter appointed to raise up issue for her father must, according to the old Hindoo Law books, be a man's own daughter, the child of his own loins ; and it is solely on the ground of this near relationship that the son of the daughter, *viz.* the "putrika putra" is classed in the same rank with the lawful son of the body.

It is true that, in default of an "ourasa" daughter,—a daughter of the body, that is,—a man could, under the old Hindoo Law, adopt a subsidiary daughter as a substitute for her ; but these adoptions were "for the sake of obtaining the heaven-procured by the daughter's son" (*vide* Dattaka Minansa, page 138, Section 18), and not for the purpose of obtaining a "putrika putra," an adopted son by means of an appointed daughter.

The appellant's Counsel have quoted from page 142 of the same work "that the daugh-

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ter given, resembling the legitimate daughter," is a substitute for issue; but this clearly refers to the adoption of a daughter by substitution, not with a view to obtaining "the heaven-procured by the daughter's sons," but for the purpose of obtaining a son by the adopter.

The only other authority brought forward by the appellant in support of his views is the case of Nawab Rai *vs.* Bhugbuttee Koowar, reported at page 5, Vol. 6, S. D. A. Select Reports. In this case it was laid down that, "notwithstanding what is stated at page 102, Vol. 1, of Macnaghten's Hindoo Law, the adoption of the daughter of a brother, on the condition that her eldest son shall be the "putrika putra" (son of a daughter) of the adopter, is legal; but it is necessary to the validity of such an adoption that it should take place previous to her marriage."

Now, on referring to the case itself (which by the way is one from the District of Sarun) it seems that the Pundits who were consulted differed in opinion. The Pundit of the Sudder Dewanny Adawlut held that the adoption of a brother's daughter was invalid during the Kali *yug* (the present age, that is), and that a "putrika putra" of this description was not mentioned in the Shastras; whilst the Supreme Court Official (a Bengallee Pundit) held it to be valid according to the authorities followed in Upper India. Under these circumstances, and, as, moreover, the case was, after all, decided on a point of evidence, the precedent is not one of high authority; but even were it admitted law, it would only carry an adoption of the kind now before us as far as the brother's daughter, and would be no authority for the adoption of a sister's daughter (which was Chuttur Koowar's position), a stranger in blood to be an appointed daughter for the purpose of raising issue for the appointing father. We think, therefore, that the appellant in the present case is not a "putrika putra," that is, he is not the son of an appointed daughter in the proper sense of the term, and has, according to ancient Hindoo Law, no status in the family of Holas Narayan.

Taking this view of the case, it is not necessary for us to enter at any great length into the second point. All the great authorities on Hindoo Law admit that, except the Dattaka and Kritima, no other forms of adoption are allowable in the present age.

Strange in his Work on Hindoo Law, Vol. 1, page 63, has the following assage:—"And now these two, the son by birth emphatically so called (ourasa), and Dattaka, the son by adoption, meaning always the son given, are, generally speaking, the only subsisting ones allowed to be capable of answering the purpose of sons, the rest and all concerning them being parts of ancient law, understood to have been abrogated as the cases arose, at the beginning of the present or Kali age."

Macnaghten also (Hindoo Law, Vol. 1, page 65):—"In the present age, two or at most three forms of adoption only are allowed in these provinces. The Dattaka or the son given, and the Kritima or the son made, are the most common; the latter obtains only in the province of Mithila. In strictness, perhaps, adoption in this form should be held to be abrogated as the affiliation of any but a son legally begotten or given in adoption is declared obsolete in the present age."

The Dattaka Minansa, a work of the very highest authority throughout the provinces governed by the Mitakshara, lays it down (page 24, para. 61):—"Sons of many descriptions, who were made by ancient saints, cannot now be adopted by men by reason of their deficiency," &c., &c.

The Dattaka Chandrika, a work of paramount authority in Bengal, takes the same view.

In connection with this, we remark that Mr. Sutherland, in a note to his synopsis at the end of the two works above mentioned, says "that the 'putrika putra' does not appear to be regarded as a subsidiary son, and it is not unreasonable to infer that the affiliation of such son would be valid in the present age"; but this, though the opinion of a very learned person, can have no weight with us, opposed as it is to the law as laid down distinctly in the Dattaka Minansa and other standard authorities and to the practice of the people living in the present or "Kali" age.

We think, therefore, that in no point of view can the appellant Utulbeharee's allegations be sustained, and we dismiss his appeal (No. 426) with costs.

With regard to appeals Nos. 413, 414, 415, 416, and 459, the Judge's decision appears to us incomplete. The appellants in these cases are holders by purchase of various parts of the property left by Holas Narayan, and they (as appears from the record) offered to prove that the sales were conducted *bonâ fide* and for the purpose, either of paying off old debts due by Holas Narayan, or for the benefit of the estate itself.

The Judge has laid down the law on this point correctly, but has made no attempt

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to apply it to the present cases. There are certain circumstances under which alienations by a Hindoo childless widow are permissible; and the appellant's purchases could not be disposed of summarily, as the Judge has disposed of them, without giving the vendees the opportunity of proving their special pleas.

These cases must, therefore, as there is no sufficient evidence on the record to enable this Court to decide them, go back to the Judge (the Nos. remaining on the file of this Court), with directions to the Judge to take, with the least possible delay, such evidence as to the legality of each particular alienation as may be preferred by either side, and to adjudicate on each separate claim, with advertence of course to the decision adverse to Utulbeharee's rights recorded above, returning his finding, with the evidence in support of it, to this Court as laid down in Section 354 of Act VIII of 1859.

The 29th April 1864.

Present:

The Hon'ble F. B. Kemp and A. T. T. Peterson, *Judges.*

Suit on bond—Proof of consideration.

Case No. 1038 of 1863.

Special Appeal from a decision passed by the Judge of Patna, dated the 4th December 1862, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 14th April 1862.

Baboo Ghansam Singh (Defendant) *Appellant,*

versus,

Chukowree Singh (Plaintiff) *Respondent.*

Baboo Greeja Sunker Muzoomdar for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

Though a bond may be genuine and duly executed, the receipt of consideration must nevertheless be proved.

Kemp, J.—THIS was a suit on a bond debt. The plaintiff sued his aunt alleging that she had executed a bond in 1850. The aunt denied the execution of the bond, and further pleaded that no consideration passed.

The Court of first instance dismissed the suit.

The Lower Appellate Court observes that "it can see no season to doubt the genuineness of the bond; that the appellant was a lady thoroughly acquainted with monetary transactions; that she has not verified her defence; and, further, that she would have defended her case in person had the instrument been a forgery." For these reasons, the decision of the Court of first instance was reversed, and the suit of the plaintiff decreed.

In special appeal the pleader for the special appellant contends that the reasons given by the Judge for finding that the bond is a genuine instrument, are conjectural, and that there has been no finding on the plea that no consideration passed.

The reasons of the Judge may not be very satisfactory; but, as he has found on a question of fact that the bond is genuine and was duly executed, we cannot touch that finding in special appeal.

On the second point we think that the suit must be remanded. The Judge, under the practice of our Courts, was bound to find whether consideration passed or not (page 29, Macpherson on Contracts, Section 15 Regulation III of 1793).

In a case decided in 1853, page 25, the late Sudder Court held that, though a defendant admitted execution of a bond, the receipt of the consideration must be proved. In this case the *factum* of the bond is denied, and, as an alternative plea, non-receipt of consideration. This plea must be adjudicated upon, and for this purpose the case is remanded to the Lower Court. Costs to follow the result.

The 30th April 1864.

Present:

The Hon'ble C. B. Trevor and A. G. Macpherson, *Judges.*

Joint Hindoo Family—Succession.

Case No. 1715 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 16th March 1863, affirming a decision passed by the Sudder Ameen of that District, dated the 23rd July 1862.

Junglee Kooer (Plaintiff) *Appellant,*

versus

Nagbuttee Kooer and others (Defendants) *Respondents.*

Baboos Kally Prosunno Dutt, Debendro Narain Bose, and *Mohendro Lall Shome* for Appellant.

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Baboos Kally Mohun Doss, Mohesh Chunder Chowdhry, and *Dwarkanath Mitter* for Respondents.

Where a Hindoo estate is held joint and undivided, the succession to it must be determined by the state of the family as to it, irrespective of any consideration of other points, such as food and residence.

Trevor, J.—THE ground of special appeal in this case is that the Principal Sudder Ameen has decided against the plaintiff's right to succession on the ground that the property being held in co-parcenary, such co-parcenary alone is not sufficient under the Hindoo Law of Inheritance, as laid down in the Mitakshara, to bar her right, but that the Court should have decided whether the family was joint in food and residence, which facts are the real tests of the unity or division of a Hindoo family.

There is no doubt that, according to the Mitakshara, property vested in a person, individually, descends to daughters on failure of nearer sapindas; but the succession in undivided families is otherwise; in these, if there be no son, son's son, or son's grand-son, the surviving brothers or nearest male heirs of the deceased succeed, and the daughters are entirely excluded. The question, then, before us is whether the Principal Sudder Ameen is right in ruling that the test of succession to property is the state of the family property itself, and that any consideration as to food and residence is comparatively immaterial, and that, as the family estate in the case before us is held jointly, the plaintiff, a daughter, is excluded from succession to it.

We think that the Principal Sudder Ameen is clearly right, and that, where no formal partition of the family estates has taken place, the family must be considered joint and undivided; and the succession descends accordingly, and this notwithstanding a separation in food and residence. We come to this opinion, relying not only on texts and precedents, but also on the very theory of Hindoo Law by which the family and the property held by it are indissolubly connected, and the order of succession regulated accordingly. It is true, discussions frequently arise as to whether a family is joint and undivided; and in considering this, it is necessary to consider whether the parties live in commensality or food with each other, and whether the property is held by them jointly and severally, and whether their other transactions are joint or otherwise; but when an estate has been determined, as in the present suit, to be held joint and undivided, we are quite clear that the succession *to it* must be determined by the state of the family *as to it*, and that any consideration of other points, such as food and residence, are immaterial.

Under this view we reject the special appeal with costs.

The 30th April 1864.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Estoppel—Admission—Act XXVII of 1860.

Case No. 278 of 1863.

Regular Appeal from a decision passed by the Judge of Rajshahye, dated the 5th June 1862.

Soorj Monee Dossee (Plaintiff) *Appellant,*

versus

Suroop Chunder Shah and another (Defendants) *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboos Dwarkanath Mitter and *Sreenath Doss* for Respondents.

Suit laid at rupees 3,76,070-11-7½.

In proceedings under Act XXVII of 1860, plaintiff called herself the guardian and trustee of her minor adopted son, but the certificate was granted to the defendant claiming under a will from her husband. Plaintiff now sues as widow of her husband, without an adopted son, to call in question the will set up by defendant, the so-called adopted son supporting her present action. HELD that the plaintiff's former statement in the Act XXVII case was no bar to her present action.

Trevor, J.—THE plaintiff in this case, Soorj Monee Dossee, sues the defendant Suroop Chunder, her husband's brother, for possession of her husband's property.

The defendant resisted the plaintiff's claim, alleging that he is entitled to the property under a will executed by his brother, by which the plaintiff is entitled only to maintenance.

The Judge remarks that "it seems contrary to all principles of law and equity to permit plaintiff to make two diametrically opposite statements in a Court of Justice merely for

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her own convenience. Having once called herself guardian of her adopted son Bippin during his minority, she cannot now be allowed to represent both herself and Bippin in different characters, merely because Bippin agrees to forego the advantage which has accrued to him from her former admission. That admission is, I must hold, binding on her, not only with Bippin, but with the whole world; and I consider that, as Bippin has now attained his majority, plaintiff has no right to contest defendant's title; in other words, that defendant should not be put to proof of his title by a person who has no title herself." The Judge, therefore, dismissed the plaintiff's suit.

From that judgment she has now appealed, urging that her statements made in a case under Act XXVII of 1860 are no bar to her present action, but that the suit should be remitted for investigation on the merits.

We think that the view adopted by the Judge is erroneous. The plaintiff called herself in the proceedings under Act XXVII of 1860, the guardian and trustee of her minor son Bippin. The certificate was granted to the defendant claiming under an alleged will; and plaintiff now comes in, in the character which she is admitted by defendant rightly to bear, *viz.* as widow of her husband, without an adopted son, to call in question the will set up by the defendant, her previously so-called adopted son Bippin supporting her present action. Whatever may be the rights between the plaintiff and Bippin, it is quite competent to her, in a suit like the present, to put the defendant to the proof of his title, and this notwithstanding her contradictory assertions regarding Bippin. That contradiction may give rise to litigation between the mother and so-called son, and in that case will be accepted as strong evidence against herself; but, as Bippin has never been declared by a competent Court to be plaintiff's adopted son, and as defendant himself admits that he is only a *paluk putro*, plaintiff is quite at liberty to recede from her former statement, and, as widow of her husband in the present case, to put the defendant to the proof of his title under the will.

Fraud as against defendant there is none. If the will propounded by defendant is valid, it will be upheld, whether there be an adopted son or not; if spurious, it will be rejected, and defendant's fraud will be defeated.

The case is remitted for investigation on its merits.

The 30th April 1864.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Mahomedan Law—Dower—Inheritance.

Case No. 512 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 20th August 1863.

Hosseinooddeen Chowdree and another (Defendants) *Appellants,*

versus

Tajunnissa Khatoon and others (Plaintiffs) *Respondents.*

Baboos Dwarkanath Mitter and *Sreenath Doss*, and *Moulvie Murhummut Hossein* for Appellants.

Baboos Kishen Kishore Ghose, Onookool Chunder Mookerjee, and *Chunder Madhub Ghose* for Respondents.

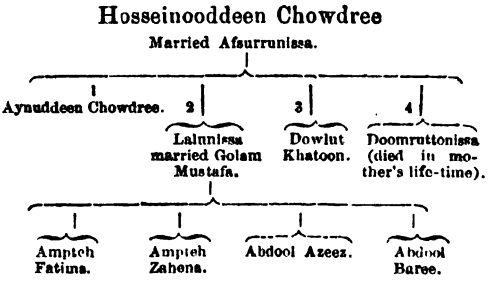
According to Mahomedan Law, *mojul* or exigible dower is payable on demand at any time from the consummation of the marriage up to the death of the wife; and a suit preferred by heirs for their mother's *mojul* dower will be in time if brought within 12 years of the mother's death.

Mowujjul or non-exigible or deferred dower is claimable on the dissolution of the marriage either by death or divorce.

Shares of dower, when received by the legal inheritors thereof, cease to be dower and become part of the recipient's estate.

Glover, J.—THESE are cross-appeals from the same decision.

The accompanying genealogical tree will assist the consideration of this somewhat complicated case:—



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It appears from the record that Hosseinooddeen Chowdree entered into a contract of marriage with Afsurrunissa on the 4th of Pous 1220, and settled upon her a dower of rupees 1,30,000. It was arranged at the time that one-third of this sum should be what is called "mojul" or exigible dower payable on demand, and the remaining two-thirds "mowujjul" non-exigible or deferred dower claimable according to Mahomedan Law on the dissolution of the marriage, either by death or divorce. The fact of the marriage is admitted on all hands, and as the genuineness of the kabinamah (deed of settlement) under which in lieu of the "mojul" or exigible dower a lien was given to the wife on all the real and personal property then in possession of Hosseinooddeen and his father, and to which he was heir, has been upheld as genuine by a decision of the late Sudder Dewanny Adawlut (*vide* Reports 1861, p. 133), there is no occasion to consider in this place the cross-allegation that the dower was of a different nature and of a much smaller amount.

The "mojul" dower was, as we have before observed, exchanged for the various property, both real and personal, then in possession of Hosseinooddeen Chowdree and for the reversion of the ancestral property which would come to him after his father's death, and the father Shamuddeen Chowdree attested the settlement deed in token of his agreement with these stipulations.

The parties were married in due course and had issue as noted above. Afsurrunissa died in 1237 B. S., without either demanding or receiving the amount due to her as exigible dowry. It is alleged in the plaint that the husband Hosseinooddeen Chowdree, who had in the meantime succeeded to his ancestral property on the death of his father, kept back the kabinamah in the hope of preventing his daughters from suing for their shares of Afsurrunissa's settlement, and of retaining the whole of the estate in his son Aynuddeen's hands; but on the latter's death in 1251 B. S., his sisters got possession of the document, and brought a suit for their quota of the settlement property. The first case appears to have been instituted in the Civil Court at Dacca in Phalgoon 1252 B. S, and in it the plaintiffs claimed rupees 32,355-9-1-1-2 as their share of both descriptions of dower. This case was partially decreed in the plaintiffs' favor by the Court of first instance; but in appeal they were non-suited for defect of stamp on the 4th February 1851, and the case, though afterwards admitted to review (September 12, 1854), was again and finally non-suited by the Sudder Court on the 21st of December of the same year.

On the 24th of March 1856, the plaintiffs sued again in *formâ pauperis*, and, their plea being admitted, filed a plaint against Hosseinooddeen Chowdree for the amount of their share *plus* interest, in all, rupees 64,711-2-2-3-1.

Lalunissa died "*pendente lite*" (3rd Aughran 1263 B. S.) leaving four minor children (*vide supra*), and by arrangements made between the parties, the nature of which is specified in the plaint, but which have nothing to do with this particular case, Lalunissa's share in the property was deducted from the amount in suit, and Dowlut Khatoon's claim only put before the Court.

This appears to have been decreed to her by the Dacca Civil Court on the 28th January 1858 (5th Magh 1265 B. S.); but on appeal to the Sudder Court, the suit was again thrown out *quoad* the "mojul" or exigible dower (9th Assin 1268—24th September 1861) this time on the ground that, as Afsurrunissa had accepted certain real property belonging to her husband in lieu of the payment stipulated, she, Dowlut Khatoon, was incompetent to sue for the value of her portion of exigible dower in cash, although she was at liberty to sue for her share of the properties so accepted by her. The present suit originated in that order.

The defendant Hosseinooddeen Chowdree urges that all the plaintiffs' claims to both descriptions of dower are barred by "limitation." We do not think it necessary to mention the objection to the "kabinamah" itself, as the genuineness of that document and of the conveyances made under it have already been adjudicated upon.

The Principal Sudder Ameen found that the plaintiffs were in time as regards the "mojul" or exigible portion of their ancestress' dower, but barred in respect to the two-thirds or "mowujjul" (non-exigible) portion. He passed a modified decree accordingly.

This judgment has dissatisfied both parties. The defendants still contend that the entire claim is barred by "limitation." The plaintiffs urge that all of it was in time; they object, also, that the Lower Court has not awarded them their proper shares.

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The questions for our consideration in this appeal are :—

1. Are the plaintiffs, respondents, within time in respect to the "mojul" or exigible portion of Afsurrunissa's dower ?

2. Are they (excluding of course Dowlut Khatoon, who received her share of the non-exigible dower by the decree of January 28th, 1858) within time as to the "mowujjul" or deferred dower ?

3. Have they received their legal shares of the property?

With regard to the first issue, we observe that, according to Mahomedan Law, "mojul" or exigible dower is payable on demand at any time from the consummation of the marriage up to the death of the wife ; and as the claim descends to heirs, it follows, under the ordinary rules of law which have always been held to be applicable to this class of cases, that a suit preferred by heirs for their mother's "mojul" dower will be in time if preferred within 12 years of the mother's death. We do not agree with the Principal Sudder Ameen that the heirs are, under the present application of the law, entitled to count limitation from the day of their own demand, *viz.* Phalgoon 1252 B. S. Were this allowable, a claim of this kind might manifestly be kept alive indefinitely by successive heirs of the original claimant until the interest quintupled the principal. "Mojul" dower is payable on demand at any time during the wife's life, but her heirs must, we think, be placed in the same category as all other suitors, and file their claim within 12 years of their obtaining the right to sue. The appellant's allegation that the cause of action arose on the consummation of the marriage is opposed to Mahomedan Law, and to the principle laid down by the Privy Council (Moore's Reports, Vol. VI, page 229, Ameerunnissa *vs.* Mooradunnissa). The dower was, no doubt, payable to Afsurunissa on that date, and she might have demanded it then had she been so minded; but she had equally a right to let it remain in her husband's hands, he acting as her trustee ; and as her power to claim it of him at any time ceased only with her life, the plaintiffs' (respondents') cause of action must be held to have commenced then, and not on their first demand for dower.

But, even on this calculation, the respondents are, in our opinion, within time. Afsurunissa died, as we have seen, in 1237 B. S. Lalunissa was born in 1231 B. S., and attained majority in 1247 B. S. Dowlut Khatoon was born in 1234 B. S. and came of age in 1250 B. S. Taking Dowlut Khatoon's case first, and calculating from the date of her majority to the institution of the present suit on the 16th Pous 1266 B. S., there is an hiatus of 18 years ; but from this must be deducted the two periods (*viz.* from the 3rd Phalgoon 1252 B. S. to the 20th Phalgoon 1257 B. S., and from the 28th Sraban 1263 B. S. to the 9th of Assin 1268 B. S.), during which the two first cases to which she was a party were "*sub judice*," in all, a space of 10 years, which diminishes the 18 years to less than twelve.

In the case of the other plaintiffs, the heirs of Lalunissa, the deduction would, of course, be only during the pendency of the first suit to which they were parties, *viz.* from Phalgoon 1252 B S. to Phalgoon 1257 B. S., or 5 years 18 days, so that, calculating from the date of this lady's attaining majority to the institution of this suit, there would be 15 years 11 months and 12 days, to be accounted for. Now it appears from the record that Lalunissa died in 1263 B. S., leaving a daughter Ampteh Fatima and other children (*vide* kurseenamah). Ampteh attained majority 2 years and 8 months after her mother's death, which, being deducted from the 15 years 11 months 12 days, brings the time to be accounted for down to 13 years 3 months and 12 days. There is, of course, no question regarding the other members of the family : they are confessedly minors at this moment.

Under ordinary circumstances, Ampteh Fatima would be evidently out of time, but there are grounds in this case for making her and the other descendants of Afsurrunissa a further allowance. They allege, and the statement is satisfactorily proved by the evidence of very respectable witnesses, relatives and connexions of the family, that Hosseinooddeen Chowdree, the respondent's father, kept possession of the kabinamah in the hope of retaining the entire property in the hands of his son Aynuddeen Chowdree, and it was only on the death of that individual that his father appears to have given up the deed in 1251 B. S. For Hosseinooddeen, therefore, now to plead limitation against his daughters and grandchildren is to endeavor to gain by his own fraud ; he first tried to effect the "laches" by concealing the kabinamah, and now wishes to profit by it.

We think that, under the special circumstances of this case, there would be, suppos-

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ing the respondents to be otherwise out of time, "good and sufficient" cause for granting them the period which elapsed between Lalunissa's and Dowlut Khatoon's majority and the discovery of the kabinamah, and we hold that the respondents' cause of action arose, not in 1247 and 1250 B. S. respectively, but in 1251 B. S.

This will have the effect of bringing Ampteh Fatima within time. Thus, the cause of action arose in 1251 B. S., and this suit was instituted in 1268 B. S. after an interval of 17 years, that is, Lalunissa's daughter Ampteh Fatima is entitled to the deduction of 5 years and 18 days as specified above, and to the 2 years and 8 months which elapsed between the mother's death in 1263 B. S. and her own attainment of majority, to a total of 7 years 8 months and 18 days, which reduces the 17 years to 9 years 3 months and 12 days.

Taking this view of the case, therefore, we think that the respondents' claim to the "mojul" or exigible dower can in no way be brought under the Statute of Limitations; and on this issue we come to the same conclusion, though on different grounds, as the Principal Sudder Ameen.

The decision of the *2nd* issue rests entirely on the same points, *viz.* the allowance for "*lis pendens*" and the four years of grace from the date of Lalunissa's majority to the recovery of the kabinamah in 1251 B. S. consequent on Aynuddeen's death. There can, we think, be no question as to the time when the cause of this part of the action would ordinarily have accrued, for, according to the terms of the kabinamah, the husband was not liable for, nor was the wife entitled to, the "mowujjul" or deferred portion of the dower till the dissolution of the marriage. In the present instance this resulted from Afsurrunissa's death, and the claims of her heirs would naturally date from that time.

The Principal Sudder Ameen has dismissed this part of the respondents' claim on the ground of limitation; but as we have already held that they are entitled to count the time between the attainment of majority and the recovery of the kabinamah, as well as that of one of the two pending suits, it follows that they are within time as regards the "mowujjul" or deferred dower also.

We see no reason, therefore, why the Principal Sudder Ameen's order regarding the "exigible" should not be equally extended to the "non-exigible" dower, and on this issue we reverse his decision, and decree favor of the respondents who claim it.

There remains only the question of shares.

The shares of Lalunissa and Dowlut Khatoon, according to Mahomedan Law, were 1*a.* 17*g.* 1*c.* 1*k.* each, but on Lalunissa's death her entire share did not go to her children, for her husband got part (a quarter share, which, however, he is admitted to have returned to his children) and the father Hosseinooddeen Chowdree received a 5*g.* 2*c.* 1*k.* share, so that there remained for the children but a 1*a.* 11*g.* 3*c.* share. To this they are entitled both in respect of the "exigible" and "non-exigible" dowers.

Dowlut Khatoon received her share of the "mowujjul" dower in 1858, so that she is only entitled now to a 1*a.* 17*g.* 1*c.* 1*k* share of the "exigible" dower.

Under the *first* issue, therefore, the respondents will receive an aggregate 3*a.* 9*g.* 1*c.* share of "mojul" dower; under the *second*, the representatives of Lalunissa will get a 1*a.* 11*g.* 3*c.* share of the "mowujjul" dower.

The other portions of shares, *viz.* those inherited by Aynuddeen, and Ameerunissa, the mother of Afsurunissa, appear to have followed the usual law of Mahomedan succession, and the present respondents at all events have no claim. They cannot follow portions of their mother's dower into the hands of other legal shareholders, nor claim at their death, otherwise than in the capacity of heirs. Shares of dower, when received by the legal inheritors thereof, cease to be dower and become part of the recipient's estate.

Nor do we think that the respondents have any claim to the property mentioned in Schedule 2. Even admitting their statement that it was purchased with the profits of Hosseinooddeen Chowdree's ancestral domains, it was not in the possession of Hosseinooddeen Chowdree at the time of the execution of the deed of settlement, and cannot, therefore, by Mahomedan Law, be considered to be included in it.

We, therefore, decree to the plaintiffs, respondents, a 3*a.* 9*g.* 1*c.* 1*k.* share of the ⅓rd or "mojul" dower claimed by them with mesne profits from date of suit, and further decree a 1*a.* 11*g.* 3*c.* share of the ⅔rds or "mowujjul" or deferred dower to the heir of Lalunissa alone. This last is to bear interest at 12 per cent. per annum from date of suit to that of realisation.

Costs will be assessed proportionately to the amount decreed.

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The 3rd May 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Jurisdiction—Lands situate in several Zillahs.

Case No. 544 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 14th July 1863.

Mussamut Bibee Fool Coomaree (Plaintiff) *Appellant,*

versus

Messrs. Gisborne and Co. and others (Defendants) *Respondents.*

Baboo Juggodanund Mookerjee for Appellant.

Mr. R. T. Allan and *Baboo Dwarkanath Mitter* for Respondents.

Suit laid at rupees 24,993.

Held that the Principal Sudder Ameen was bound to decline to exercise jurisdiction as soon as he became aware that the land in dispute was partly situate not within his jurisdiction.

Morgan, J.—THE only question which we can now decide is the question of jurisdiction. We cannot enter into the question of property, that is to say, whether the land in dispute is part of the plaintiff's Pergunnah of Gurhee within the Zillah of Purneah, or whether it is part of the defendant's Pergunnah of Tillia Gurhee within the Zillah of Bhaugulpore. The right of property must be decided in a suit properly framed, to be adjudged by a Court of competent jurisdiction.

In this suit the Court below has decided that there is no jurisdiction, because the land in dispute is situated within the Zillah of Bhaugulpore, and not within the Zillah of Purneah, where the suit was instituted. Upon that matter, there is evidence in the shape of certain awards of arbitrators made under Regulation IX of 1833. According to those awards, assuming now that they apply to the land in dispute, the arbitrators have decided that the lands form part of the defendant's Purgunnah Tillia Gurhee, which is a pergunnah situate in Zillah Bhaugulpore. If that is so, and those awards had been brought to the notice of the Principal Sudder Ameen at an earlier stage in the suit, he might perhaps have been of opinion that, within the meaning of the proviso of Section 14, there had been an adjudication by competent authority that the land in dispute belonged to the defendant's pergunnah, whereupon, in obedience to that proviso, the plaint would have been rejected or returned. As the matter was not brought to his notice in that stage, he was unable to follow the course pointed out in that proviso. On this appearing before him in evidence in the case upon the trial of the issue which he had framed (whether the land was within the jurisdiction of his Court or not), it certainly was material evidence to show that he had no jurisdiction. This is on the assumption that the lands mentioned in those awards are the lands now in dispute. Some question has been raised here as to whether the lands mentioned in the awards are identical with the lands now in dispute, and some difficulty, no doubt, arises with respect to the reference there made to the murgung or old bed of the river. As it is clear that this objection is now made here for the first time, and that throughout the proceedings up to this time, it has been assumed without dispute that the lands mentioned in the awards are the same as the lands sued for, we think we are justified in coming to this conclusion. In this view the Court below rightly held that it had no jurisdiction to try the case.

But there is another view of the matter upon which it also appears that that Court had no jurisdiction. The land claimed by the plaint was defined in a somewhat uncertain way. The defendant may have been misled by this uncertainty. The fact is that both parties proceeded upon this assumption that, whatever land was claimed by the one by his plaint, in respect of that same land, the suit was defended by the other. In the progress of the case, it was reported by the Ameen (and his report is adopted by the Court) that, as to a certain portion of the land claimed, namely 126 beegahs, it appertained (as clearly appeared both from the *thak* and survey maps) to the plaintiff's Pergunnah Gurhee. In respect of that land being within the plaintiff's Pergunnah of Gurhee, which again was within the Zillah of Purneah, the Court had jurisdiction. In respect of the other portion of land, which, on enquiry, was ascertained (at least for the purpose of jurisdiction) to be not within the Zillah of Purneah, but within the Zillah of Bhaugulpore, the Court had not jurisdiction. If the suit was instituted for land which was partly within the Zillah of Purneah and partly within the Zillah of Bhaugulpore, it was a suit clearly beyond the jurisdiction of the

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Court unless upon authority derived from this Court under the 12th Section of the Code of Civil Procedure. The Principal Sudder Ameen in his decree has treated this portion of the land as land regarding which it was unnecessary to make a decree, because it was land of which the defendant had not been shown to be in possession. As it was land which was included by the plaintiff in the lands claimed by her, it was necessary for the Court to adjudicate the suit in some way in respect of this part of the claim, either by dismissing the plaintiff's suit, or otherwise. It was not competent to the Court to abstain from determining the suit in respect of this land. If the fact was not within the knowledge of the Principal Sudder Ameen at the time when the suit was instituted, he was bound to decline to exercise jurisdiction in such a suit as soon as he became aware that the land, the subject matter of the suit, was partly situate not within his jurisdiction, and was, therefore, land situate within several Zillahs.

In either view of the case, the Court, in our opinion, had no jurisdiction. The effect of the decree of the Court will be not to conclude any question between these parties as to the right of property in the land in dispute, but merely to determine that the Principal Sudder Ameen of Purneah had no jurisdiction to entertain this suit.

We dismiss the appeal with costs.

The 3rd May 1864.

Present:

The Hon'ble C. Steer and F. A. Glover, *Judges.*

Enhancement — Presumption — Assessment of Lakheraj land.

Case No. 2688 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 21st June 1863, reversing a decision passed by the Moonsiff of that District, dated 3rd September 1862.

Romesh Chunder Dutt (Plaintiff) *Appellant.*

versus

Gooroo Doss Nundee and another (Defendants) *Respondents.*

Baboo Greeja Sunkur Muzoomdar for Appellant.

Baboo Baneenath Bose for Respondents.

The Lower Court, having found as a fact that the tenure in dispute existed upon its present jumma in 1783, and had since paid the same amount of rent, and having inferred from this that a tenure existing in 1783 and never challenged until now may with good reason be taken to have existed some years before 1783 so as to be protected from enhancement,—HELD that the presumption was not unwarranted by the facts as found by the Lower Court, and could not be interfered with in special appeal.

A lakheraj shown to have been held prior to 1790, cannot be assessed until in a resumption, suit the plaintiff, succeeds in getting a declaration entitling him to resume the lakheraj.

Steer, J.—THE plaintiff sued to enhance the rent of the defendant.

The defendant pleaded that he held some of his lands as a portion of the jote of Sookdeb Nundee, a tenure which existed prior to the Permanent Settlement; another portion he held under 4 mourosee pottahs granted by the former talookdars; another portion was lakheraj; and a 4th portion was not in his possession at all.

The first Court dismissed the plaintiff's claim altogether.

The Principal Sudder Ameen found from positive and circumstantial evidence, that the jote of Sookdeb Nundee existed prior to the Permanent Settlement, and could not be enhanced. He found that 3 out of the 4 mourosee pottahs were genuine; and that as to the lakheraj, the defendant had given satisfactory evidence that the tenure was lakheraj; and with respect to the lands alleged by the defendant to be out of his possession, he passes no opinion.

The objections taken against the judgment of the Lower Court are—

1*st.*—That the *onus* of proving that the tenure of Sookdeb Nundee existed prior to the Permanent Settlement rested on the defendant, and that he had given no such evidence.

We find that the Lower Court was satisfied by the documentary evidence that the tenure existed upon its present jumma in 1783, and that it had since paid the same

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uniform amount of rent. The Court inferred from this that a tenure existing in 1783, and never challenged until now, may, with good reason, be taken to have existed some years before 1783. This presumption is certainly not unwarranted, and, as it is the province of the Lower Courts to find the facts, and the presumption has satisfied the Court below that the jote of Sookdeb Nundee was of that ancient date as to be protected from enhancement, we cannot interfere with this finding. It might have been that we should not have been disposed to draw the presumption from *the facts* which the Lower Court has done; but the decision of the fact is with them; and as they have disposed of the fact on what is certainly evidence, we cannot interfere with their finding in special appeal.

The next objection taken is that the mere allegation that land is lakheraj does not bar the plaintiff's right to an adjudication whether it is lakheraj or not. This is no doubt correct as matter of law; but it is not a mere allegation of the defendant that the land is lakheraj, but the allegation is supported by very respectable proof; and we are quite of opinion with the Lower Court that a lakheraj shown to have been held prior to 1790 cannot be assessed until, in a resumption suit, the plaintiff succeeds in getting a declaration entitling him to resume the lakheraj.

The third objection is that the Lower Court has given no opinion as to whether the lands which the defendant says are not in his possession are in his possession or not. This objection we find to be correct, and as there must be a local enquiry as to what is a fair and equitable rent upon the mourosee jote which the Court has found not to be proved, that opportunity may be taken to ascertain also whether it is a fact or not that the defendant is not in possession of the lands described by him. If he is found by the local enquiry to be in possession, these lands may be at once assessed; and if he is not in possession, the plaintiff cannot call on the defendant to pay him any rent for them.

The case is remanded on this point; but, in all other respects, the judgment of the Lower Court is affirmed; and, considering the very partial benefit which the special appellant has obtained in this special appeal, we consider it right to give the costs of it entirely against him.

The 4th May 1864.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Right of Suit—Money paid under compulsion of Law.

Case No. 1822 of 1863.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 10th June 1863, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 29th November 1862.

Juggobundhoo Ghose (Defendant) *Appellant,*

versus

Chowdhry Mumtaz Hossein (Plaintiff) *Respondent.*

Baboos Tarucknath Sein and *Banee Madhub Banerjee* for Appellant.

Baboos Nil Madhub Sein and *Judoonath Mookerjee* for Respondent.

Money paid under compulsion of law cannot be recovered back as money had and received.

Glover, J.—It appears from the record of this case that special respondent (plaintiff in the Court below) owed the special appellant, Juggobundhoo Ghose, rupees 1,100, for which he executed a kistbundee, and, as additional security, gave to one Sreenauth Ghose, a servant of the special appellant, an "ijara" lease of land, with the understanding that the "usufruct" from 1251 B. S. to 1257 B. S. should be paid yearly to the special appellant in liquidation of his debt.

Subsequently special appellant sued on the kistbundee, and the special respondent pleaded payment through the "ijaradar"; but a decree for the balance found to be due on the bond, *viz.* rupees 421, *plus* interest and costs, was given against him on the 1st of March 1861; the Court at the same time referring defendant (special respondent) to the "ijaradar" for the recovery of his money. This, according to special respondent, so frightened that individual, that he offered to give him absolute proof that the money for which the decree had been given against him, had really been paid to special appellant, and at last handed over the original decree, with an endorsement admitting the

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payment on its back. Special appellant on this first applied for a review of judgment, but failing in that, brought the present action to recover the amount improperly paid by him under the decree.

The Court of first instance held that the suit was barred under Section 2 Act VIII of 1859, but the Judge remanded it for trial on its merits.

The only point urged in special appeal, is that this is a suit for a matter already decided by a competent Court, a "res judicata," which cannot be re-opened now.

Special respondent took an "in limine" objection to the hearing under Section 363 of Act VIII of 1859, on the ground that no appeal lies from an order passed in the course of a suit. But the Section cited refers to regular appeals only, and is not therefore applicable to the present case. By it it is enacted that no appeal (regular) shall lie from an order passed in the course of a suit and relating thereto *prior to decree*, whereas by Section 372, which is applicable to special appeals alone, a special appeal will lie from all decisions passed in regular appeals, on the ground of the decision being contrary to some law or usage having the force of law. In the present case, the remand order was in consequence of a decision alleged to be contrary to law, and that decision, irrespective of its consequence, was a legitimate subject for a special appeal.

With regard to the main question before us, we find that the amount now claimed by the special respondent (a conclusion arrived at with the greatest difficulty, in consequence of the special respondent's vakeel either not knowing or not wishing to inform the Court about the real items) *viz.* rupees 1,449-2 is made up as follows :—

Original sum decreed	421	7
Interest on ditto prior to decree	421	7
Costs	13	7
Interest on unpaid instalments	255	15
Costs	115	11
Interest from date of decree up to date of payment	220	2
Rupees	1,448	1

In other words, special respondent now claims from special appellant the very amount which he was obliged to pay him under the decree of a competent Court, which decree, not having been appealed against, has long ago become final and conclusive, so that, were he to get a decree now against his former plaintiff, the effect would be to reverse a judgment not legally questionable.

The rule of law applicable to this case is, not that the matter is a "res adjudicata," but that money "paid under compulsion of "law cannot be recovered back as money "had and received" (*vide* Smith's Leading Cases, vol II, page 327, Marriot *versus* Hampton). "For after the defence in an action has failed" says Lord Kenyon, "and money "has been recovered in the action, it cannot "be recovered back in another action; for to "allow it would be to try every question "twice, for the same legal ground which would "entitle a plaintiff to recover in this present "action, would have been a good defence "to the action brought against him. After "a recovery by due process of law—not "extortion, there must be an end of litiga-"tion."

We think, therefore, that this appeal should be allowed, and the Judge's order for re-trial on the merits, reversed with costs. The special respondent's case is legally remediless.

The 5th May 1864.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Mortgage—Non-receipt of consideration-money (Time for pleading).

Case No. 1101 of 1863.

Special Appeal from a decision passed by the Judge of Patna, dated the 17th December 1862, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 5th April 1862.

Afzul Khan (Defendant) *Appellant*,

versus

Chytun Roy (Plaintiff) *Respondent*.

Baboos Debendro Narain Bose and *Kalee Kishen Sein* for Appellant.

Baboos Kissen Succa Mookerjee and *Chunder Madhub Ghose* for Respondent.

Where a mortgagor omitted to plead in the foreclosure suit that he did not obtain the whole of the consideration-money, he was not permitted to set up that plea for the first time in the subsequent suit for possession.

Kemp, J.—The special appellant is the mortgagor. The mortgage transaction took place in 1838. The mortgagee applied for foreclosure and obtained it under the pro-

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visions of Regulation XVII of 1806. The present suit is for possession. The mortgagor now raises a plea for the first time, that he did not obtain the whole of the consideration-money, and that this point ought to have been decided by the Court below.

We think that there is no ground for this appeal. The plea ought to have been taken at latest in the foreclosure stage. If the special appellant omitted to raise this point in the proceedings taken in the matter of the foreclosure, he cannot be permitted to set it up in an answer to a second suit. Again, if the consideration-money was not received, he had his remedy by a suit for the return of the mortgage deed on the plea that the transaction was fraudulent in its inception, or he might have tendered within the year of grace the money actually due. The appellant having taken none of these steps, is now precluded from raising the point of non-receipt of the whole of the consideration-money. Were we to hold otherwise, we should be permitting him to raise this question 26 years after the time when he had a complete and perfect right of action in respect of it.

We dismiss the appeal with costs and interest.

The 5th May 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Putnee (Sale of) — Recovery of deposit by purchaser.

Case No. 2099 of 1863.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 27th April 1863, *reversing a decision passed by the Moonsiff of that District, dated the 23rd February* 1863.

Sheikh Khoda Buksh (Plaintiff) *Appellant,*

versus

Degumburee Dossee and others (Defendants) *Respondents.*

Baboos Onookool Chunder Mookerjee and *Upprokash Chunder Mookerjee* for Appellant.

Baboo Nubo Kishen Mookerjee for Respondents.

The purchaser of a putnee sold in execution of a decree cannot recover from the original putneedar the sum which the purchaser had to deposit a few days after his purchase, in order to stay a sale by the zemindar under Regulation VIII of 1819.

Seton-Karr, J.—It is argued that the Appellate Court was wrong in ruling that the plaintiff, purchaser of a putnee at a sale in execution of a decree, could not recover from the original putneedar the sum which the purchaser had to deposit a few days after his purchase, in order to stay a sale by the zemindar under Regulation VIII of 1819.

We think the judgment of the Lower Court correct in law. The purchaser at auction must be held to have bought the tenure with all its liabilities. One of these was the instalment due to the zemindar at the approaching period for sales under Regulation VIII. The original putneedar was not bound to pay his rent then, for he might have allowed his tenure to be put up for sale by the zemindar. Consequently, the new purchaser has no legal claim on the original putneedar, and there can be little doubt that the existence of an unpaid instalment of rent was perfectly well known to the purchaser at the auction sale, when he effected his purchase.

But, even if it were not, the purchaser took the putnee burdened with all its liabilities, and cannot come down for re-imbursement on the former owner of the tenure.

Appeal dismissed with costs.

The 6th May 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Limitation (by whom and when to be objected).

Case No. 2139 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 21st April 1863, *reversing a decision passed by the Moonsiff of that District, dated the 20th September* 1862.

Sreemutty Beedhoo Dassee (Plaintiff) *Appellant,*

versus

Muddun Gopal Rukheet (Defendant) *Respondent.*

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Baboo Mohendro Lall Sandyal for Appellant.

Baboo Tarucknath Dutt for Respondent.

Where a party does not take the ground of limitation, the Court should not take it. The party who makes such a plea is bound to put it forward at first; if he does not, he will be held to have waived it.

Jackson, J.—THE Appellate Court has in this case dismissed the plaintiff's claim as barred by Section 246 Act VIII of 1859, not having been preferred within one year of the date on which a decision adverse to that claim was passed in execution of decree.

It is stated on special appeal that the defendant raised no such objection to the hearing of the suit, and that the defendant, though he appealed, made no allusion to it in his grounds of appeal; that the Judge should therefore not have applied the Law of Limitation when it was not pleaded.

We think that the Appellate Court should have tried the case on its merits. In special appeal No. 144 of 1861, reported at page 49 of the January Decisions for 1863, it was ruled that, if the parties did not take the ground of limitation, the Court should not take it. The party who makes such a plea, is bound to put it forward at first; and if he does not, it will be held that he has waived it.

The decision is reversed, and case remanded for trial on merits.

The 6th May 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Sale by guardian of minor (Reversal of)—Re-imbursement of purchase-money.

Case No. 2132 of 1863.

Special Appeal from a decision passed by the Judge of Behar, dated the 30th April 1863, reversing a decision of the Principal Sudder Ameen of that District, dated 10th January 1862.

Agooree Hurrihur Churn (Plaintiff) *Appellant,*

versus

Gunga Persad Oopadhya (Defendant) *Respondent.*

Mr. John Baptist for Appellant.

Where a Judge reversed a sale by the guardian of a minor during his minority, but directed that the purchaser should be re-imbursed the amount of his purchase-money from whatever mesne profits might be found to be due to the minor,—HELD that as the purchaser was a *bonâ fide* purchaser for valuable consideration and not in any way acting in collusion with the guardian, the minor was liable for the purchase-money.

Jackson, J.—THIS was a suit to recover possession of certain landed estate which had been, during plaintiff's minority, sold by his guardian. The Judge on appeal decreed the claim and reversed the sale, but directed that the purchaser should be re-imbursed the amount of his purchase-money from whatever mesne profits may be found to be due to plaintiff.

The ground of special appeal is that plaintiff is not liable for the purchase-money, but that the purchaser should sue the guardian to recover that money.

We think the decision of the Judge is conformable with equity and justice on the fact which he has found that the purchaser was a *bonâ fide* purchaser for valuable consideration, and not in any way in collusion with the guardian. The plaintiff has, as the Judge remarks, his remedy against the guardian.

The 6th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Execution—Construction 1129.

Case No. 1252 of 1863.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 29th January 1863, reversing a decision of the Principal Sudder Ameen of that District, dated the 26th June 1862.

Kishen Soonder Roy (Plaintiff) *Appellant,*

versus

Prosunnonath Bhuttacharjee (Defendant) *Respondent.*

Baboos Sreenath Doss and *Ishan Chunder Chuckerbutty* for Appellant.

Baboos Dabendur Narain Bose and *Mohinee Mohun Roy* for Respondent.

Construction 1129 was held strictly applicable to a case where the lands sued for were actually taken in execution of a former decree, and no question of identity remained to be decided.

Steer, J.—THIS is a suit for land taken, as it is alleged by the defendant, in execution of a decree obtained by him against the plaintiff's predecessors.

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The Judge in the Lower Court held that this action to recover lands which were considered to belong to defendant by the Court which passed the original decree, could not lie under the Construction 1129 and the decision of the late Sudder Court of date the 19th May 1857.

It is contended in special appeal that the Construction quoted is not applicable, inasmuch as the lands now sued for were not involved in the former decree, and there was no adjudication by the Court executing the decree in respect to these lands, or any express order holding that they were included in the decree.

It is fully admitted that the lands now sued for were actually taken in execution, and there is no question whatever as to the identity of those lands. It appears further that the plaintiff petitioned the Court executing the decree that these lands were not decreed to the defendant, and could not be taken in execution. There does not appear, as far as the records show, that there was any express order in respect to the objection taken by the plaintiff, but nevertheless, the lands were taken and kept and given in possession as part of those decreed to the defendant.

The plaintiff might, if he had so chosen, have urged the Court to pass some definite order, but he did not do so, and evidently withdrew his ground of dispute. When, therefore, the Court did not think proper to divest the defendant of the lands given to him in right of his decree, and the plaintiff rested satisfied with the action of the Court in respect to that matter, his original contention was to all intents and purposes overruled, and the plaintiff acquiesced in it.

That being the state of the case, we are clearly of opinion that the Construction 1129 is strictly applicable to the case of these parties. It was the province of the Court executing its decree to declare what lands were decreed or not. The lands now in dispute were allowedly taken and kept as lands which the defendant, under the decree, was entitled to, and it was certainly a matter involved in the decree whether certain lands seized in execution were included in the decree or not. Therefore, the contention of the pleader for the special appellant that the Construction 1129 does not apply, inasmuch as it was no matter involved in the decree whether the lands now in dispute were included in the decree or not, is altogether unsound; for a question whether a certain plot of land is included in a decree to be put in force, is most certainly matter involved in the decree; and in fact if a thing taken in execution of a decree could afterwards be made the subject of a fresh civil suit, no suit would ever end, for in every execution the same question might be over and over again revived, and so litigation would be endless.

A decision of the late Sudder Court was quoted (S. D. A. Decisions for 1858, page 209) by the pleader for the special appellant as being a case in point where Construction 1129 was held not to apply.

But the circumstances of that case are totally different to this. *There* it was not apparent, in respect to the lands in dispute, whether they had in fact been taken and delivered over in execution of a former decree, nor was it clear whether, in respect to the lands formerly decreed, they had formed the subject of a judicial award. Enquiry was, therefore, deemed to be necessary in order to have it cleared up whether the lands formerly decreed, and those for which the after-suit was brought, were identical or different. But in the present case it is admitted that the lands now sued for were actually taken in execution of the former decree, and no question of identity remains to be decided. Therefore, this case and the case relied upon are not analogous cases, and the decision in one can be no rule for the decision of the other.

We hold, therefore, the judgment of the Lower Appellate Court to be sound, and we dismiss the special appeal with costs.

The 6th May 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Mortgage — Government Revenue.

Case No. 2125 of 1863.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 27th April 1863, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 31st December 1861.

Gour Chand Shah (Defendant) *Appellant,*

versus

Jumal Reza and others (Plaintiffs) *Respondents.*

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Baboo Poorno Chunder Mookerjee for Appellant.

Mr. C. Gregory for Respondents.

A mortgagee in possession, in paying the Government Revenue to save the estate mortgaged to him, has a claim on the mortgagor for his *laches* in not paying that revenue which, under the mortgage deed, he was bound to pay.

Jackson, J.—The plaintiffs in this case sought to recover from defendants, their ijaradars, a sum of rupees 573-13-3, being principal and interest due for 10 years, on an annual payment of sicca rupees 35, which the defendants had, on taking the ijarah, agreed to pay to plaintiff, but had failed to do so.

The defendants replied that they had taken the ijarah in mortgage for a loan of rupees 1,000; that the terms of the deed were that the profits of the ijarah were to go to the defendants in liquidation of the loan, with the exception of a sum of 35 sicca rupees, which was to be paid to plaintiffs; that the plaintiffs were bound to pay the revenue of the estate, but neglected to do so; that defendants accordingly paid that revenue; that if the amount they paid is set-off against the amount due to plaintiffs, they have to receive money from the plaintiffs, and are not in any way their debtors. The defendants proved these payments, which appear to be very much in excess of the sum claimed by plaintiffs.

The reply of plaintiffs is that the defendants have entered into a solehnamah with a third party to whom the plaintiffs have now sold their rights in the estate, to the effect that they have received from him a certain sum of money in lieu of all claims against plaintiffs. This solehnamah is not with the record.

The Lower Appellate Court has held that defendant's payments of the revenue were made of their own accord and without plaintiffs' consent; and that even, if the defendants had any claim on account of these payments, the acquittance given to the third party releases defendants from all liabilities on that score.

On special appeal it is said that the acquittance in the solehnamah was given on an account of all sums, both claimed by plaintiffs and due to defendants, being taken into consideration.

It is evident that the solehnamah was not entered into with the plaintiffs, and the plaintiffs cannot therefore derive any benefit from its terms. It is good as respects any claims on the estate which the third party may prefer. But it neither binds plaintiffs from preferring their claims against the defendants, nor restrains the defendants from urging any defence to that claim. The plaintiffs have not produced this solehnamah as evidence in the case. But it stands to reason that the defendants would not compromise a debt due to them of several thousand rupees, leaving themselves still open to a claim of a few hundred rupees; and it is clear that they entered into no compromise with the plaintiffs. Defendants therefore are entitled to have their claim to a set-off enquired into. We think it is a denial of justice for the Judge to lay down that the mortgagee, in paying the Government revenue to save the estate mortgaged to him, has no claim on the mortgagor for his laches in not paying that revenue which, under the mortgage deed, he was bound to pay. Payments made under such circumstances are claimable from the mortgagor. Defendants have proved their payments, and taking them into consideration, plaintiffs are not entitled to any decree against defendants. The Lower Court's decision is reversed, and plaintiff's suit dismissed with all costs, and interest at 12 per cent. per annum to date of payment.

The 9th May 1864.

Present:

The Hon'ble J. P. Norman, *Offg. Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Evidence—Adoption.

Case No. 1726 of 1863.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 25th February 1863, *affirming a decision of the Principal Sudder Ameen of that District, dated the* 17*th September* 1862.

Kishen Sunker Dutt (Plaintiff) *Appellant*,

versus

Moha Mya Dossee and others (Defendants) *Respondents*.

Mr. R. T. Allan for Appellant.

Baboos Greesh Chunder Ghose, Dwarkanath Mitter, and *Sreenath Doss* for Respondents.

Where a subsequent deed of permission to adopt was proved, a distinct reference made in it to a former deed of the same character which corresponded in every particular with the description of it given in the subsequent instrument, was, in the absence of proof of the existence of any other document or of anything calculated to throw doubt on the former instrument, held sufficient to establish its identity.

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Glover, J.—SPECIAL appellants (plaintiffs in the Courts below) who are the nephews of one Kummul Narain, deceased, sued as reversioners for possession of the property left by their uncle, on the ground that the unomutteeputro (permission to adopt) put forward by Purmessurree, a widow of the deceased, was a fabricated document. They alleged likewise that Kummul Narain was insane and incapable of giving such permission, or even of contracting marriage at all.

The unomutteeputro executed by Kummul Narain in favor of Purmessurree, recites that on the 26th of Phalgoon he had executed a deed of permission in favor of his then wife, Surnomoee, which was not registered, and that Surnomoee being dead, he goes on to give to Purmessurree "power to adopt," so that according to the conditions contained in the deed of permission given to Surnomoee she, Purmessurree, might adopt seven sons in succession one after another. He desires that Purmessurree should act up to all the conditions contained in the deed of permission to Surnomoee, and he says "you will not act otherwise than in conformity with the other deed given to the Dassea; should you do so, it will be void."

Both Lower Courts dismissed the suit, the Judge holding that Kummul, though subject to occasional fits of mental aberration, had lucid intervals during which he had married and had given his wife Purmessurree permission to adopt. His first judgment referred to the unomutteeputro given to Purmessuree only; but on an application for review, he held that the first permission to adopt granted to Surnomoee might be considered as inferentially proved by the references made to it in the second, which last was in his opinion a well authenticated document.

It is urged in special appeal that, as the validity of the second unomutteeputro depended on proof of the first, the Lower Court was bound to try the issue whether the latter document was genuine, and that its not having done so, made its judgment defective.

On this we observe that the Judge, when an application for review was made to him, recorded his opinion that the first unomutteeputro was established by the second, and whether he did so on sufficient legal grounds, is the only question for our consideration.

Now, in the unomutteeputro given to Purmessurree, the nature of the permission given to Surnomoee is distinctly set forth, and the date on which it was given is mentioned. On turning to the document produced as the permission to Surnomoee, we find that it corresponds in every particular with the description of the said instrument, and in the absence of any proof of the existence of any other document, or of anything calculated to throw doubt on this one, we think that its identity as the same referred to must be taken as established, and that the Judge has rightly so considered it.

Cases of this sort are analogous to those of wills and codicils. "A will or codicil," says Mr. Justice Williams, "not duly attested may be re-published and made operative by a subsequent codicil bearing the requisite attestation, though the latter document be in no way annexed to the will or prior codicil; but it has been held that it must distinctly refer to it" (Williams on Executors, Volume I, page 185). In the present case the Judge has held the second permission to adopt proved by direct evidence, and has inferred from it that the first is proved also.

There is, as we observed before, a distinct reference to the first unomutteeputro in the preamble of the second, and the dates and names agree. This is amply sufficient to shew that, at the time of the execution of the second deed, Kummul referred to, recognized, and treated it as a valid instrument, and we therefore uphold the Judge's order, dismissing the appeal with costs.

The 10th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Estoppel—Compromise.

Case No. 1349 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Cuttack, dated the 31st January 1863, affirming a decision passed by the Moonsiff of that District, dated the 27th April 1862.

Man Gobind Doss Mohapattur and others (Defendants) *Appellants,*

versus

Jankee Ram Mohunt (Plaintiff) *Respondent,*

Baboo Hem Chunder Banerjee for Appellants.

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Baboo Greesh Chunder Ghose for Respondent.

A defendant cannot fall back on a deed of compromise conceding to the plaintiff a portion of his claim, after having subsequently contested the whole case on the merits and run his chance of obtaining a decree dismissing the plaintiffs' entire claim.

Steer, J.—THE plaintiff and the defendant were at issue as to whether the latter had made a sale of certain lands to the former. While the suit was pending in which this issue was to be tried, the parties filed a deed of compromise in which the defendant agreed to give the plaintiff some share in the lands, and the plaintiff agreed to accept them. Eight days afterwards the plaintiff withdrew from the compromise, saying that he only entered into it, with a view to obtain from the defendant an acknowledgment of title.

The first Court considering that the compromise was binding on the parties, decided the suit in conformity with the terms of that deed.

The Judge, in appeal, was of opinion that the plaintiff was at liberty to back out of the compromise, and he accordingly reversed the decision of the first Court, and remanded the case for trial on the merits whether there had been a sale or not.

On the remand the first Court held that there had been a sale, and the second Court coincided in that view. The plaintiff has, therefore, gained all he came into Court for.

The defendant now files a special appeal, in which he contends that the parties having mutually agreed as to their respective rights, the compromise ought to have been the basis of the Lower Court's decision. But we think that, when the defendant made no appeal against the order of the Judge who considered that the compromise might be abandoned and treated as not binding, and allowed the case to go back on the merits, and as it was originally started, he must be considered to have waived and abandoned any alleged right he may have acquired by the compromise.

Furthermore, it would not be equitable to allow the defendant to fall back on a deed of compromise conceding to the plaintiff a portion of his claim, after having subsequently contested the whole case on the merits and run his chance of obtaining a decree dismissing the plaintiff's case *in toto*.

We, accordingly, dismiss the special appeal with costs.

The 10th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Limitation (Time for pleading).

Case No. 1376 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 27th December 1862, reversing a decision passed by the Moonsiff of Mozufferpore, dated the 15th September 1862.

Bechoo Misser and others (Defendants) *Appellants,*

versus

Ramadheen Misser and others (Plaintiffs) *Respondents.*

Baboo Gopeenath Mookerjee for Appellants.

Baboo Anund Gopal Palit for Respondents.

Where the plea of limitation was not taken in the Court below, it was not allowed to be urged in special appeal.

Levinge, J.—THE first point urged in special appeal is the plea of limitation; but as that was not taken in the Court below, we cannot in this case allow it to be here urged. The next point is that the judgment is not clear in deciding the plaintiff's right to the 9 beegahs 12 cottahs of land; but we are of opinion that the judgment does specifically declare the plaintiff's right to the 9 beegahs 12 cottahs of land, and, therefore, we dismiss this appeal with costs.

The 10th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Lakheraj—Putnee—Limitation.

Case No. 1339 of 1863.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 30th January 1863, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 28th November 1862.

Okhoy Ram Janah (Defendant) *Appellant,*

versus

Syud Mahomed Hossein and others (Plaintiffs) *Respondents.*

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Baboo Mohendro Lall Shome for Appellant.

Mr. R. E. Twidale for Respondents.

A zemindar who gives his estate in putnee lease, has still such an interest in the property as entitles him to challenge the right of another who asserts to hold it adversely to him on a lakheraj title.

Steer, J.—THE plaintiff sued to resume the lands of the defendant as held on an invalid title.

The defendant pleaded—

1. That the plaintiff had given his property in putnee to a third party and had therefore no right of action.

2. That he pleaded limitation, but the Court below has confined itself to the enquiry solely as to the validity of the tenure.

On the *first* point we think that a zemindar who gives his estate in putnee lease, has still such an interest in the property as entitles him to challenge the right of another who asserts to hold it adversely to him on a lakheraj title, for the proprietary title is in him, and whatever is to the injury of his proprietary title is a valid cause of action to him.

In regard to the *second* point,* we find the objection taken to be valid. It matters not whether the title is valid or not; it may be invalid; but still if the lakherajdar is able to give such proof of possession as a lakheraj-holder prior to 1790, he is at liberty to plead and to plead successfully the Statute of Limitations against the zemindar who has not sued to resume within 12 years from the acquisition of his own title. The case must, therefore, be remanded, in order that it may be tried, 1*st*, whether the plaintiff is an auction-purchaser within 12 years from the institution of the suit. If so, he is not barred even if the defendant should succeed in proving that his possession dated before 1790; but if it should be found that his purchase was more than 12 years ago, and the plaintiff can give proof of his possession prior to 1790, the plaintiff must be held to be beyond time.

* Disposed of by Full Bench Ruling—*See* 2 Weekly Reporter, Civil Rulings, p. 207.

The 10th May 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Suit between joint-owners (for secretion of Estate papers)—Damages—Hearsay Evidence.

Case No. 323 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 26th March 1863.

Pitumbur Doss (Defendant) *Appellant*,

versus

Ruttun Bullub Doss and others (Plaintiffs) *Respondents*.

Baboos Dwarkanath Mitter and *Tarucknath Sein* for Appellant.

Mr. R. T. Allan and *Baboo Greesh Chunder Ghose* for Respondents.

Suit laid at rupees 10,000.

One joint owner, for secreting the estate paper, after removing them from their ordinary place of deposit at the cutcherry-house, and thereby depriving his joint owners of the means of using them for the purpose of collecting the rents and other debts due to them, is guilty of a wrong for which he is liable in a suit for damages.

The taking down of mere hearsay evidence in a case where hearsay is not admissible as evidence, condemned.

Norman, C. J.—THIS is a suit by Ruttun Bullub Doss and others for the recovery, as per certain schedules of the collection papers, &c. of the ijmalee zemindaree and joint banking business of the plaintiffs and defendant, alleging that the papers of the zemindaree, &c. were kept in the cutcherry house, and that the defendant having spent more than his share, and plaintiffs being entitled to recover such amount from him, on the night of the 29th Assin 1268, *i. e.* 13th of October 1861, the defendant took from the cutcherry the papers in question to the house of Kishen Mohun Biswas; that, after discovering this, the plaintiffs found out that the defendant had carried off other papers during the tumult of the Dusserah festival on the 25th of Assin in the preceding year; that, owing to the defendant having carried away the papers, the accounts could not be adjusted with the

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surburakars, nor could the collections be made; that the sums remaining unrealized from the ryots and surburakars of the zemindaree down to 1268 in respect of the petitioner's share were rupees 2,000; from the tenants of the ijarah mehals rupees 750; misappropriated by the defendant, rupees 3,000, and unrealized from the debtors of the banking business, rupees 4,250; in all Rupees 10,000.

The defendant answered that he did not take away the papers, and in fact that the plaintiffs themselves had done so, he being about to sue them for the recovery of monies misappropriated.

The Lower Court decreed the suit, and ordered that, if the papers were not restored, the plaintiffs should recover from the defendant the full amount of the monies claimed, with interest and costs of suit.

On appeal it was objected before us by Baboo Dwarkanath Mitter, *first*, that a suit by one joint-owner to recover papers taken possession of by another joint-owner, will not lie, the defendant being as much entitled to the possession of them as the plaintiff, and that the suit must therefore be dismissed, the plaintiff's only remedy being by a suit for the dissolution of the partnership. *See* Mayhew and Herrick, 7 Common Bench Reports, 229. But assuming it to be true, that all the joint-owners are equally entitled to the possession of the joint estate, and the papers relating to it, and therefore that the mere taking of the papers from the cutcherry-house was not a tort for which the defendant could be made liable, every joint-owner for the time being in actual possession of such papers would hold them subject to the right of the other joint-owners to inspect and make use of them at all reasonable times; and we think therefore that the defendant in secreting the papers after their removal from their ordinary place of deposit at the cutcherry-house, and depriving the plaintiffs of the means of using them for the purpose of collecting the rents and other debts due to them, of which there is ample evidence, was guilty of a wrong for which he is liable in damages.

Secondly, it was objected that the evidence did not warrant the finding of the Principal Sudder Ameen

We observe, however, that the taking of the papers by the defendant is proved, not only by the evidence of numerous witnesses, but by the testimony of the collection Mohurir Kishen Mohun Biswas to whose house they were removed. It is admitted that the papers have been taken away, and the defendant gives no evidence whatever in support of his statement that the plaintiffs removed them. There is a coincidence of dates which strongly supports the plaintiff's story. The defendant is charged with having taken away the papers on the 13th of October 1861. The plaintiffs took immediate action and instituted criminal proceedings against the defendant. A local investigation took place, and the darogah reported that the defendant had taken the papers. The Joint Magistrate, however, on the 26th of February 1862, very properly dismissed the criminal case on the ground that the taking was not a criminal offence, but a matter cognizable by the Civil Court. The defendant forthwith on the 28th of February instituted two suits in the Civil Court, alleging that the plaintiffs were indebted to him, and setting up this story of the carrying off of the documents by the plaintiffs. Those suits, the special appeals in which are now before us, were dismissed.

We think that there is, therefore, ample ground for the conclusion of fact at which the Principal Sudder Ameen arrived in the present case.

While on this part of the case, we would remark on the very large number of witnesses who, according to the statement of the Principal Sudder Ameen, appear to have spoken from hearsay. The Principal Sudder Ameen should caution witnesses to speak only of matters within their own knowledge, and not waste his time and encumber the nuthee by taking down mere hearsay evidence in a case where hearsay is not admissible as evidence.

The last point made is that there is nothing to warrant the award of damages. It is enough, however, to say that we think that there is evidence sufficient to justify the decree for damages to the extent awarded, *viz.* rupees 10,000. These damages are not to be paid if the papers are restored, and of that the respondent does not complain; but if we ourselves had been trying the case, we are disposed to doubt whether we might not have given very substantial damages for the improper secretion of the papers, even though they should be now given up.

We modify the decree by ordering that, unless the papers are restored to the cutcherry-house within one month from this date, execution shall forthwith be issued for the above amount of damages with interest and costs of suit, and we dismiss the appeal with costs and interest.

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The 10th May 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Mortgage—Foreclosure—Share of property.

Case No. 2188 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 7th May 1863, affirming a decision of the Moonsiff of that District, dated the 18th December 1862.

Bissessur Thakoor (Plaintiff) *Appellant,*

versus

Gunga Bissen Misser and others (Defendants) *Respondents.*

Mr. A. F. Lingham for Appellant.

Baboo Poorno Chunder Mookerjee for Respondents.

The decree of the first Court having been wrong in not defining with sufficient certainty what was the property or the share of the property in respect of which the mortgagee was entitled to foreclose,—HELD that the Lower Appellate Court, instead of dismissing the suit by reason of this defect, should have remedied the defect itself, or (if it had not the means to do so) remanded the case to the first Court for that purpose.

Morgan, J.—WE must remand this case. It was a suit for foreclosure of a mortgage of a share of property. The decision of the Court of first instance was that the mortgage was proved, and that the mortgagee had duly served the notice, and that he was entitled to foreclose. But in respect of some portion of the mortgaged property, as to which there was a defect in the mortgage title by reason of its being the property of minors which the guardian had no right to mortgage, the Court of first instance, as to this share, disallowed the plaintiff's right to redeem. The decree of the Court of first instance was wrong in respect of its not defining with sufficient certainty what the property was, or the share of the property in respect of which the mortgagee was entitled to foreclose. He was declared to have a right to foreclose; but the property which was the subject of foreclosure was left uncertain, and the Appellate Court properly noticed this defect in the decree. But the Appellate Court, by reason of this defect, reverses the decree and dismisses the suit. That seems to us to be an improper mode of dealing with the matter. The Appellate Court should itself have remedied the defect, if it had the means of doing so; or (if it had not) should have remanded the case to the Court of first instance, in order that that Court might ascertain and declare in its decree with precision what the property was in respect of which the plaintiff had a right to foreclose. For this purpose we must set aside the decree of the Lower Appellate Court, and remand the case to the Court of first instance, in order that that may be determined, and a decree of foreclosure for a certain quantity of the property made.

The 10th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Hindoo Law — Limitation — Suit by son to set aside alienations by father—Special Appeal—Costs.

Case No. 1297 of 1863.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 19th January 1863, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 13th September 1862.

Beer Pershad and others (Plaintiffs) *Appellants,*

versus

Doorga Pershad and others (Defendants) *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboos Kalee Kishen Sein and *Debendro Narain Bose* for Respondents.

According to the Mitakshara Law, a suit by a son to set aside alienations by his father must be brought within 12 years from the date of alienation, or within 12 years from the date of the son attaining majority, supposing the alienations to have been made during his minority.

The question of how costs have been awarded, is not a point for special appeal.

Steer, J.—THIS case was first taken up on the 7th instant, when the following judgment was passed :—

"This is a suit to set aside certain aliena-
"tions made by the plaintiff's father as ille-
"gal under the Mitakshara Law, the same
"having been made without necessity, and
"without the plaintiff's consent.

"The plaintiff's father is still alive, and
"therefore the plaintiff merely sues in right
"of his being a joint owner with his father,
"to set aside the father's alienations.

"To some of the alienations the Judge
"in the Court below has applied the law of
"limitation. Giving the plaintiff exemption

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"under the law on account of his minority, "he holds that he was bound to bring his "suit to impugn the alienation within 12 "years from the date of his becoming a "major.

"It is contended in special appeal that "this view is not correct, and a decision of "the late Sudder is relied upon as an au- "thority in support of the above contention. "That decision appears to have ruled that a "suit brought by a son for possession of pro- "perty unlawfully alienated by the father, "would be in time, if instituted within 12 "years from the father's death. The plead- "er, therefore, argues inferentially that, if "a son does not incur limitation by waiting "till his father's death, no matter when "that may occur, he cannot be considered "to have incurred limitation by not having "sued within 12 years from the date of his "becoming of full age.

"But a distinction is to be drawn between "the action of a son for possession, and the "action of a son to impugn a deed of aliena- "tion. In the one case, the cause of "action accrues on the death of the parent; "in the other the cause of action accrues from "the date of the alienation. For possession "the son must wait till the death of the father, "and then he may sue for possession, in "which suit any alienations made without "warrant of law by the father would of "course be cancelled. But that is not the case "where the suit is solely to impugn an act "of alienation. In such a case, the cause "of action is the unlawful act of the father; "and if the son does not choose to come "into Court to try the right of the alienee "within 12 years from the date of the "alienation, or within 12 years from the date "of his attaining majority, supposing the "alienation to have been made during minor- "ity, he forfeits his right to do so, and cannot "during his parent's life-time disturb the "contract which he has suffered to exist "unchallenged for 12 years.

"The same principle was laid down in "a judgment of the High Court given on the "8th June 1863, in the case of Jeonath Bhug- "gut and others *versus* Roopa Koer and "others, where it was held that a reversion- "er, who sued during the life-time of a "Hindoo widow to impugn a sale made by "the widow, had debarred himself of his "right under the Statute of Limitations, by "not having sued within 12 years from the "date of the cause of action, which in that "case was taken to be the alienation made "by the widow.

"The judgment of the Lower Court "ruling that the suit was barred with re- "spect to those of the alienations which have "been made the subject of argument in this "special appeal, is therefore quite correct, "and we affirm the judgment and dismiss the "special appeal with costs."

After the judgment in this case was put in, the pleader for the special appellants objected that the Court had not heard him on all the points upon which he had intended to argue. We were under the impression that we had heard the only point which the pleader had to raise; but as we have no reason to doubt from what the pleader now asserts that he had not concluded his arguments, that our impression was wrong, we allow the pleader to resume his argument.

He urges that the Judge has awarded costs improperly. The plaintiff sued to set aside several sales made to different parties. The suit was valued at 1,200 rupees, but the interest of the several defendants did not amount each to 1,200 rupees, and, therefore, their costs ought not to have been given them as upon a suit of the value of 1,200 rupees.

It is very far a matter of discretion how costs are to be awarded; and the question as to how costs have been awarded is not, as a matter of right, a point for special appeal. It is matter for consideration and argument how in a case of this sort costs should be awarded, and the time to argue that point was when the case was pending appeal before the Lower Court, and it was the duty of the special appellant not to allow the case to leave the Judge's hands till he had been heard upon the point. We, therefore, cannot see in the objection raised, a proper ground of special appeal, and our order of the 7th instant, dismissing the special appeal with costs, will stand.

The 11th May 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Mortgage — Redemption — Sale of part of the lands for arrears of revenue.

Cases Nos. 2207 and 2208 of 1863.

Special Appeals from decisions passed by the Judge of Patna, dated the 28th April 1863, affirming decisions of the

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Principal Sudder Ameen of that District, dated 5th February 1863.

Syud Hashim (Defendant) *Appellant,*

versus

Baboo Aujeet Singh and others (Plaintiffs) *Respondents.*

Mr. R. E. Twidale for Appellant.

Moulvie Syud Murhumut Hossein for Respondents.

A mortgagor cannot redeem a share of the mortgaged property.

This rule is not affected by the sale of part of the mortgaged lands for arrears of revenue.

Morgan, J.—We must reverse the judgments of both the Lower Courts in these two cases.

It is quite clear that persons who become entitled to a portion of property which is subject to a mortgage, have no right to come to Court in a suit to redeem and ask that their portion of the property may be set free from the mortgage. The mortgage must be paid off wholly. The mortgagee has a right to retain the whole of the mortgaged property until the debt is paid.

The circumstance on which the Judge relies in giving the plaintiffs a decree is this. The mortgage originally was a mortgage of certain larger property, some portion of which has been sold for arrears of revenue. The mortgagee is said to have consented to that sale. But whether he consented or not is quite immaterial, because it was a sale by a higher power which he had no ability to resist. This sale for arrears of revenue of a portion of the mortgaged property, is supposed by the Judge in some way to have affected the mortgagee's right to his mortgage security in respect of the remainder. We think the Judge is in error in attributing the effect he has done to the sale of part of the land for arrears of revenue, and in not considering the present case to be subject to the ordinary rule which prevents a mortgagor from redeeming a share of the mortgaged property. We must decree these appeals, and reverse the judgments of both the Lower Courts with costs. The effect of our decree will be to dismiss both suits with costs.

The 11th May 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Lakheraj—Resumption.

Case No. 34 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated 3rd July 1863.

Mrs. Barbara Ameena John Elias (Plaintiff) *Appellant,*

versus

Moonshee Mahomed Peezeer and others (Defendants) *Respondents.*

Mr. R. E. Twidale and *Baboo Banee Madhub Banerjee* for Appellant.

Moulvie Syud Murhumut Hossein for Respondents.

Suit laid at rupees 6,683-2.

A zemindar is not precluded by Regulation XIX. 1793 from suing for the resumption of invalid lakheraj lands exceeding 100 beegahs held under several sunnuds, provided none of them singly is a grant for more than 100 beegahs.

The release of lands covered by one such sunnud, from the claim of Government to resume, on the ground that they were under 50 beegahs, does not bar the zemindar's right to resume them.

Jackson, J.—The plaintiff, zemindar of 10 annas share Mouzah Satsooka, preferred this suit for the resumption of beegahs 135 13 cottahs lying within his estate, which he alleged that the defendants held on invalid lakheraj tenure.

The Lower Court dismissed the suit, because on the plaint it was evident that the holding exceeded 100 beegahs in extent, and the zemindar was, under Sections 6 and 7 Regulation XIX of 1793 and the precedent of the 26th May 1860, competent to resume only holdings under 100 beegahs.

It is urged on appeal that, as the plaintiff has stated in his plaint that this lakheraj land is held under several sunnuds, the law and precedent quoted do not apply.

Regulation XIX of 1793 declares that the revenue assessable on resumed lakheraj land not exceeding 100 beegahs and that may have been alienated by *any one grant,* shall belong to the zemindar. The decision of the 26th May 1860 is in accordance with this Regulation. That suit was dismissed, because the land exceeded 100 beegahs, and *it was not disputed that it was held under one sunnud.* The facts in this case are quite distinct. Here, not only does the plaintiff allege that the land is held

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under several sunnuds, but the defendants in their answer admit that it was originally alienated under different sunnuds, not one of which is said to have been a grant exceeding 100 beegahs. If these lakheraj sunnuds are resumable, the revenue assessable on the land belongs to the zemindar. The plaintiff's suit should therefore be heard, and has been wrongly thrown out by the Lower Court.

As regards the lands covered by one sunnud, the Lower Court has dismissed the claim to resume, because, on an enquiry by the Government with the view to resume, the lands were released from the claim of the Government. Here, again, the Lower Court has been in error. Those lands were released from the claim of Government only because they were under 50 beegahs in extent, and were therefore not liable to resumption by the Government, but by the zemindar. There was no adjudication that the lands were valid lakheraj, and there could be no binding adjudication on such a point, except on the suit of the zemindar.

The Lower Court's judgment is in direct contravention of the law, and it is surprising to us that so high a Judicial Officer as a Principal Sudder Ameen should display such ignorance of the simplest points of resumption law. The decision is reversed, and the case remanded for proper trial.

The 11th May 1864.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Alluvial land—Land-marks.

Case No. 274 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 27th February 1863.

Maharajah Mohessur Buksh Singh Bahadoor (Defendant) *Appellant,*

versus

Salgram Singh and others (Plaintiffs) *Respondents.*

Mr. J. Baptist, Moonshee Ameer Ali, and *Baboo Dwarkanath Mitter* for Appellant.

Mr. R. T. Allan and *Baboo Hem Chunder Banerjee* for Respondents.

Suit laid at rupees 9,750.

In a case of dispute as to whether certain lands are within the plaintiff's or the defendant's estate, both estates having been temporarily submerged, and the land-marks having disappeared, the right of the parties to the lands in dispute can only be properly determined by having the position of the old land-marks clearly laid down.

Trevor, J.—This suit has come up in appeal from the Principal Sudder Ameen of Shahabad.

The contention between the parties is whether the 815 beegahs now in dispute are within plaintiff's estate of Sina Bunowra, or within that of the defendant's Shilabdeharee.

It appears that the boundary between the two estates was an old pathway running from east to west. It appears too that a dead river ran also from east to west some small distance to the north of the pathway. In 1858 the river Ganges changed its course and discharged its waters into the dead river, which then became the main stream, and portions of the lands of both zemindarees were submerged, and the land-marks then drawn of the estates disappeared. In 1859 the river again receded, and the lands reappeared Contentions arose between the zemindars regarding the lands, and the defendants were eventually confirmed in possession by an order passed under Act IV of 1840 in 1861. Hence the present suit by the plaintiff.

Now it is clear, in a case of this nature, that the right of the parties to the lands in dispute can only be properly determined by having the position of the old land-marks, the pathway and the course of the dead river, clearly laid down. The villages belonging to the parties before the Court have both been surveyed; so means exist by which the old site of the dead river and the pathway, can be accurately laid down by a person of sufficient knowledge of surveying which the Civil Ameen has.

As, therefore, the enquiry made by the Principal Sudder Ameen is not so full and clear as we could wish, we, retaining the case on our own file, direct the Principal Sudder Ameen to depute into the mofussil without delay the Civil Court Ameen, with the thakbust map of the villages in dispute, copies of which he will obtain from the Collectorate. The Ameen will then, by means of these, or a map to be prepared by him, a counterpart of the thakbust maps, accurately mark the spot in which the old

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river ran, and in which the pathway was situated *at the time at which* the thakbust maps were prepared, and he will then note the particular locality of the land in dispute, with reference to these land-marks, and also its exact area.

The Civil Court Ameen, having prepared this map, will forward it to the Principal Sudder Ameen, who will transmit it to this Court. The case will then again be taken up, and the necessary orders passed on it without delay.

The 12th May 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Mortgage.

Case No. 2174 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 6th May 1863, *modifying a decision passed by the Sudder Ameen of that District, dated the 5th December* 1862.

Mohun Lal (Plaintiff) *Appellant*,

versus

Sheikh Ali Afzul and others (Defendants) *Respondents*.

Baboo Kalee Kishen Sein for Appellant.

Baboo Tarucknath Sein for Respondents,

The mortgagor under a zur-i-peshgee is entitled, under Section 2 Regulation I. 1798, to demand back his land immediately after making his deposit. If by mistake or otherwise he demands more land than is comprised in the mortgage, that is not a matter which can justify the mortgagee in keeping possession of land which is in fact comprised in it.

Norman, C. J.—In this case the plaintiff sues for possession and wasilat from 1258 to 1269 F. The plaintiff who had mortgaged the land to the defendant on the 28th of Bhadur 1258, paid into Court under Regulation I of 1798, Section 2, the amount of the zur-i-peshgee. The defendant did not take the money out of Court, and retained possession of the land on the plea, which the Lower Court finds to be proved, that the plaintiff had demanded possession of more land than was comprised in the mortgage. On that ground the Principal Sudder Ameen has disallowed the claim of wasilat, and from that decision the plaintiff appeals specially before us. The respondent alleges that the tender was conditional.

We are of opinion that, under Section 2 Regulation I of 1798, the plaintiff was entitled to demand back his land immediately after making his deposit, and that if by mistake or otherwise he demanded more land than was comprised in the mortgage, that was not a matter which in any way justified the defendant in keeping possession of land which was in fact comprised in it. We, therefore, decree the appeal and declare that the plaintiff is entitled to possession with mesne profits from the date of the payment into Court, 28th Bhadur 1258; the amount to be ascertained in execution of the decree, and all the costs of the suit in proportion.

The 12th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges*.

Mahomedan Law — Pre-emption — Sale.

Case No. 1304 of 1863.

Special Appeal from a decision passed by the Judge of Patna, dated the 12th February 1863, *reversing a decision passed by the Moonsiff of that District, dated the 22nd September* 1862.

Mussamut Ojheoonissa Begum (Defendant) *Appellant*,

versus

Sheikh Rustum Ali (Plaintiff) *Respondent*.

Baboo Greesh Chunder Ghose and *Moulvie Syud Murhumut Hossein* for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

According to Mahomedan Law, the affirmation by witness need not be made by the claimant of the right of pre-emption in person, but may be made by a duly constituted agent.

As, according to Mahomedan Law, where either the seller or buyer repudiates the sale, there can be no sale, so neither can there be any right of pre-emption in such a case.

Steer, J.—This is a pre-emption suit. The plaintiff is a 7 anna proprietor, and the defendant a 9 anna proprietor of the same property, and it is alleged that the latter has made a private sale of it to the defendant purchaser for 90 rupees, but that the price has been falsely entered in the bill of sale as 200 rupees for the purpose of defeating the plaintiff's claim of pre-emption.

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The defendant pleaded, 1*st*, that the required ceremonies were never performed at all; 2*ndly*, that, if performed, they were not performed according to law, having been done, as admitted by the plaintiff, by proxy; 3*rdly*, that the sale was not completed, and no right of pre-emption accrued at all.

Upon all these issues, involving some very nice and difficult points of Mahomedan Law, the judgment of the Lower Appellate Court is thus briefly expressed:—

"The evidence on the record, I am of "opinion, may be relied upon. If the ap-"pellant pay 200 rupees, I am of opinion he "is entitled to purchase under the law of "pre-emption. The orders of the Moonsiff "are reversed."

We need hardly say that such a judgment in such a case reflects any thing but credit on the presiding Judge, Mr. E. F. Lautour.

It appears that, when the plaintiff first heard of the sale at his own dwelling, he did what the Mahomedan Law requires in the presence of witnesses. But it appears that he did not make affirmation by witnesses before the defendants *in person*, but he sent his brother to demand that the sale might be made to him. This, it is contended, is the flaw in the proceeding, as the Mahomedan Law requires that the affirmation by witness should be made by the claimant of the right of pre-emption in person, and a decision of the late Sudder Court, Volume for 1857, page 1172, was referred to, in which this doctrine is said to have been maintained.

In the case quoted, it was established that the party making affirmation came forward and proclaimed to the purchaser that the plaintiff intended to claim his right, without any previous communication with the claimant, and therefore without any authority to act as an agent in the matter. In the present case there is no doubt that the party who made the affirmation on behalf of the plaintiff, was his delegated agent for that very purpose, so that the two cases are not similar in that important respect. No other authority has been shown to us in support of the objection that all and every part of the ceremonies must be done by the claimant of pre-emption in person. It is our opinion that, unless there is a clear provision in the law that the claimant must go to the seller or the purchaser or to the spot, and there make affirmation by witness in his very person, and cannot under any circumstances delegate this duty to another, it can be done by a duly constituted agent. Acts done by an agent are recognized in law as the acts of the principal, and we see no reason; why the same maxim should not apply in a case of pre-emption to these ceremonies which in their nature are capable of being performed by an agent. What he could not do by agent, *viz.* declare his determination to become the purchaser as soon as the news of the sale reached him, he did in person; and what we have held may be done by agent, *viz.* making the demand in presence of witnesses that the sale be transferred to him, he did in that manner; and we think therefore that, in respect to all needful preliminaries, the requirements of the Mahomedan Law have been complied with.

As far, then, as relates to the performance of the ceremonies, we think the plaintiff has, upon the established facts, not lost his right of pre-emption on the ground of his having omitted to perform, in the manner required by law, any of the prescribed preliminaries necessary for the support of a valid claim.

The next question to be dealt with is, whether, supposing the allegation of the defendants, the seller and the purchaser, to be true, namely, that they had mutually withdrawn from the negociation of sale before the purchase-money was paid, or delivery of the property given, the plaintiff's claim to pre-emption can be enforced.

A sale is a complete sale in the eye of the Mahomedan Law where the seller says orally, "I have sold," and the purchaser says, "I have bought."

In the present case, where a bill of sale has been actually written out and signed by the seller, he no doubt has done his part towards the completion of the sale; he has in fact proclaimed in a more solemn and formal manner than by word of mouth that he has sold. But if the bill of sale is still in the seller's hands, and has never left them, and nothing has been done by the purchaser, such as the payment of the purchase-money, or entry into possession, which would be tantamount to his acquiescence in the sale, one essential element for the constitution of a complete sale is wanting, for the purchaser has not said either directly or indirectly "I have bought."

Where the law is so peculiar in its construction of what is necessary to make a sale, and where a third party, under the peculiar provisions of the Mahomedan Law, seeks

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to compel the enforcement of a contract which both the principals to it are willing to revoke, he cannot expect that the law, which he seeks to enforce in all its stringency against his opponents, shall be relaxed in his favor. If the plaintiff insists in maintaining that the contract of sale, which certainly would not under any other law, perhaps, but the Mahomedan Law, be binding on the contracting parties where title deeds have not been delivered, possession given, or the money paid, his opponents, the defendants, have a right to insist that the strict letter of the Mahomedan Law be applied to the plaintiff also. Therefore, if the Mahomedan Law requires a declaration of purchase from *both* the seller and purchaser, and one of those only have made the declaration, the sale has not been completed.

It might have been that the alleged sale has been cancelled for the sole purpose of defeating the plaintiff of his right of pre-emption; and if it could be shown that, after the completion of the sale in any manner which the Mahomedan Law recognizes as valid, the parties withdrew from it merely to injure the plaintiff, he would no doubt be entitled to a decree. But the statement of the seller and purchaser is that there was some delay in finding the purchase-money, and before it was found, the occasion for the sale passed away, and both sides therefore agreed to withdraw from the negociation. No evidence has been given to contradict this statement, which is not improbable in itself, nor has any proof been adduced that the purchase-money was in fact paid, or that the title deeds were delivered to the purchaser, or that seisin was had. Therefore there is no warrant for the conclusion that these things actually took place, and no warrant therefore for holding the purchaser to be in the position of one who by his acts has proclaimed that he has bought the property.

We think, then, even in the narrow view of the Mahomedan Law, that the sale as between the defendants was not a complete one; and as either the seller or buyer had it in his power to repudiate the sale, and both have done so, the plaintiff's right of pre-emption has not accrued. There has been no sale, and therefore no right of preferential purchase.

In this view we reverse the judgment of the Lower Court, and dismiss the plaintiff's suit, with costs and interest.

The 12th May 1864.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Mahomedan Law—Death-bed Gift.

Case No. 2445 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 16th July 1863, *reversing a decision passed by the Sudder Ameen of that District, dated the 11th December* 1862.

Mussamut Kureemun and others (Plaintiffs) *Appellants,*

versus

Mullick Enaet Hossein and others (Defendants) *Respondents.*

Mr. R. V. Doyne and *Baboo Roopnath Banerjee* for Appellants.

Mr. C. Gregory for Respondents.

According to Mahomedan Law, if a person executes a gift when laboring under a sickness from which he never recovered, and which ultimately proved fatal to him, effect can be given to the instrument only to the extent of ⅓rd.

Macpherson, J.—In this case certain of the defendants (respondents in this Court) set up a title to possession of lands under a mokururee tenure created in their favor by their grand-father Mullicklall Mahomed Khan. The instrument creating the tenure was executed by Mullicklall Mahomed some months,—how long does not precisely appear,—before his death, but at a time when he was afflicted with *rasha*, or shaking palsy.

The Court of first instance held that the mokururee tenure was intended to be a gift, and that the parties being all Mahomedans,

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the instrument creating it should have effect to the extent only of ⅓rd of the property it referred to, as being a death-bed gift made by a sick man during his last and fatal illness.

On appeal this decision was set aside. The Lower Appellate Court seems to have confined itself to the consideration of one point only, *viz.* whether the instrument creating the mokururee was a *bonâ fide* document or not. The Court found that it was, and ordered that full effect should be given to it, without restricting its operation to ⅓rd of the property comprised in it.

In special appeal it is contended that the decision of the Lower Appellate Court is defective. It is urged that the Court ought to have adjudicated upon the question as to whether the instrument was or was not executed by the deceased while laboring under a sickness from which he never recovered, and which subsequently proved fatal; and also that there should have been a distinct finding as to whether the deceased in fact created the *mokururee* tenure by way of gift or otherwise, and as to whether any and what possession ever was obtained under it during the life-time of Mullicklall Mahomed.

There can be no doubt that the objections taken in special appeal are valid; and that the decision of the Lower Appellate Court is very defective. The questions referred to are all of them material, and without their being duly adjudicated upon, justice cannot be fully done to the parties. If the mokururee was in the nature of a gift, and if Mullicklall Mahomed, when he executed it was laboring under a sickness from which he never recovered, and which proved fatal to him, it is clear that the Court of first instance was right in giving effect to the instrument only to the extent of ⅓rd (*see* Macnaghten's Mahomedan Law, pages 51,197). But it is essential to know whether the deceased, in granting the tenure, granted it practically by way of gift; and, under certain circumstances, much may also depend on the question as to whether the parties ever obtained possession under the mokururee during the life-time of the deceased.

The case is remanded. The Lower Court, after finding the facts fully and carefully, with reference to the above remarks, will then apply the Mahomedan Law to the facts so found. The costs of this appeal will be costs in the cause, and abide the final decision of the suit.

The 12th May 1864.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Sale—Incomplete Contract.

Case No. 2654 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 29th June 1863, reversing a decision passed by the Moonsiff of that District, dated the 20th June 1861.

Raj Chunder Chowdhry (Plaintiff) *Appellant,*

versus

Rajnath Chowdhry and others (Defendants) *Respondents.*

Baboos Hem Chunder Banerjee and *Kalee Mohun Doss* for Appellant.

Baboo Bhugobutty Churn Ghose for Respondents.

A bill of sale, though duly executed, was not delivered to the purchaser, but was deposited with a third party to be held by him until the purchaser should perform certain acts, the performance of which was the consideration for the sale. The purchaser subsequently by a trick got possession of the bill of sale before he had performed all the acts in question. HELD that, under such circumstances, no effect could be given to the bill of sale as against the vendor, so that a suit for possession of the lands covered by it would not lie.

Macpherson, J.—THE special appellant sued for possession of certain lands under a bill of sale. The defendants (respondents in this Court) admit the execution of the bill of sale, but plead that it ought not to be enforced against them, as the appellants have not performed the condition, the performance of which was the only consideration for the bill of sale. The Court of first instance decided in favor of the plaintiffs, but that decision was reversed on appeal. The Lower Appellate Court considered it proved that the bill of sale was executed on condition that the plaintiffs should withdraw two suits which they and others had instituted against the defendants; that on execution it was not delivered to the plaintiffs, but was placed in the hands of a third party as "depositary" for the purpose of the instrument being registered and delivered up to the plaintiffs, as soon as the suits were withdrawn; that subsequently one suit was withdrawn by the plaintiffs, but the other was not; that accordingly the deed was never registered by the "depositary," but the plaintiffs got possession of it from him by some cunning device. Under these circumstances the Court reversed the original decree, and decided in favor of the defendants in the suit.

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In special appeal it is contended that, even on the facts as found by the Lower Appellate Court, the plaintiffs are entitled to a decree. It is urged that, inasmuch as the bill of sale was duly executed, the transfer was complete, and that if part of the consideration has not been performed, the defendants may have a remedy in a suit for damages for the breach of contract, but cannot plead that breach as a defence in this suit for possession. And a decision of the late Sudder Court* was relied upon as supporting this contention.

*S. D. A. 1860, Vol. II, p. 239.

We are of opinion that the case referred to has no application to the case now before us. In that case the contract was complete, the deed signed and delivered. In this case it is clear that there never was any legal delivery, and that there was no intention that the bill of sale should ever reach the plaintiffs' hands, or that it should be registered, or be in any way acted upon, until the two suits had both of them been withdrawn. The withdrawal of both suits was a condition precedent to the completion of the sale of the lands; and that being so, the plaintiffs cannot be permitted to derive any benefit from the mere fact of their having "by a cunning shift" contrived to get possession of the deed from the third party in whose hands it had been deposited for the protection of all interested.

The appeal is dismissed with costs.

The 12th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Evidence—Property in a Tree.

Case No. 2 of 1864.

Regular Appeal from a decision passed by the Judge of Patna, dated the 14th September 1863.

Chutoor Bhooj Tewaree (Defendant) Appellant,

versus

Syud Villaet Ali Khan (Plaintiff) Respondent.

Baboos Onookool Chunder Mookerjee and *Chunder Madhub Ghose* for Appellant.

Mr. R. T. Allan and *Moonshee Ameer Ali* for Respondent.

A person's title or property in a tree may be proved by showing that the tree grows on his land, without proof of any acts of ownership over the tree.

Levinge, J.—* * * *

It has been said by the pleaders for the appellant that the plaintiff has shown no acts of ownership over this tree, and relies strongly on this as evidencing a clear defect of proof of title or property to the tree; but we are at a loss to see what acts of ownership could be expected to be proved. Is it expected that, when the title to a tree is called in question, the plaintiff is to show he exercised a right of property in the tree, or, failing that, he is to lose it? It is quite sufficient if he shows it grows on his own land, for there it is expected that it may rest and flourish unmolested.

* * * * * * *

The 13th May 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge.*

Hindoo Law of Inheritance—Sister's son — Paternal uncle — Mother — Trustee (of son not conceived).

Case No. 1642 of 1863.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 11th February 1863, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the 13th June* 1862.

Rash Beharee Roy (Defendant) *Appellant,*

versus

Nimaye Churn and others (Plaintiffs) *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboos Nil Madhub Sein and *Gopal Lal Mitter* for Respondents.

A sister's son, in order to have a preferential title over his paternal uncle, must have been born or conceived when the succession opened out.

It is contrary to Hindoo Law that a mother should be a trustee for a son who might hereafter be conceived.

Kemp, J.—This is a suit for the recovery of possession in right of inheritance of certain properties.

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The annexed tree shews the position of the family :—

Lukeenath Roy.

Gorung=Sooda Monee. Rash Beharee, *Defendant.*

Pitambur. Adur Monee. daughter.

Nimaye Churn, *Plaintiff.*

The estate claimed is that of Pitambur.

Sumboo Chunder Roy, Appellant, *versus* Gunga Churn Sein, Respondent. Dated 24th July 1838, page 234. } The Judge held that, under a ruling of the late Sudder Court in the case noted in the margin, a sister's son succeeds to the exclusion of the paternal uncle, and that, therefore, the plaintiff in this case succeeds to the estate of Pitambur. The decision of the Court of first instance was reversed.

In special appeal it is urged that, under the Hindoo Law, inheritance never remains in abeyance ; and that, as the plaintiff was not born when his uncle Pitambur and his grand-mother Sooda Monee died, he cannot inherit ; and that Rash Beharee, the defendant, is entitled to succeed to the estate of Pitambur.

It is clear that, on the death of Pitambur, his mother Sooda Monee would inherit his estate. On the death of Sooda Monee, if the plaintiff was born or was *in utero*, he would be entitled to succeed. The parties are at issue upon the fact of the date of the plaintiff's birth. The defendant avers that plaintiff was born many years after the death of Sooda Monee. The plaintiff, on the other hand, though he admits that his birth took place after the death of Sooda Monee, contends that he was in his mother's womb when that event took place. This point has not been enquired into by the Judge. The decision upon which the Judge relies is of doubtful authority (*vide* remarks attached to that decision), and it has been overruled by a later decision of the Sudder Court dated the 13th December 1860. The sister's son, to give him a preferential title over the paternal uncle, must have been born or conceived when the succession opened out. In this case the succession opened out to the plaintiff on the death of Sooda Monee ; and if, on that date, he was in the womb of his mother, he would be entitled to succeed to the estate of Pitambur in preference to his paternal uncle Rash Beharee. The contention of the pleader for the respondent, that the mother of the plaintiff was a trustee for a son that might hereafter be conceived in her, is contrary to all acknowledged principles of Hindoo Law, *see* page 221 of the Vyavastha Durpana.

The case must, therefore, be remanded for an enquiry into the fact of whether the plaintiff, at the time of the death of Sooda Monee, was in the womb of his mother or not, for on the finding of this issue depends the plaintiff's claim to inherit.

Costs to follow the result.

The 13th May 1864.

Present :

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Section 88 Act VIII of 1859—Attachment.

Case No. 2272 of 1863.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 30th April 1863, *affirming a decision passed by the Principal Sudder Ameen of that District, dated the 6th June* 1861.

Kishen Chunder Singh Roy (Defendant) *Appellant,*

versus

Mr. G. M. Gasper (Plaintiff) *Respondent.*

Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Appellant.

No one for Respondent.

Section 88 Act VIII of 1859 is not applicable to an attachment made previous to that Act coming into operation.

Morgan, J.—The award of costs is not shown to be in any way erroneous, so as to afford ground for special appeal.

With reference to the other objection, urged by the pleader for the special appellant, we think that the Judge was quite right in holding that the provisions of Section 88 of Act VIII of 1859 were not applicable to the attachment made previously to that Act coming into operation.

The special appeal is dismissed.

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The 16th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Sale—Bona fide purchaser.

Case No. 1496 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 30th March 1863, reversing a decision passed by the Moonsiff of that District, dated the 30th April 1862.

Shaikh Gholam Ahea (Plaintiff) *Appellant,*

versus

Digumbur Singh and others (Defendants) *Respondents.*

Messrs. J. Baptist and *C. Gregory* for Appellant.

Baboo Debendro Narain Bose for Respondents.

It is not a legal sequitur that, because the sale to *A*'s vendors was fraudulent, *A*'s purchase must be null and void. If *A* was a *bonâ fide* purchaser for valuable consideration without notice of the fraud, there is no reason why he should be deprived of the benefit of an honest purchase.

Levinge, J.—The Lower Appellate Court has found that the plaintiff's (special appellant's) vendors were fraudulent purchasers from the first debtors, and that, as the plaintiff's vendors had no title to convey, he declared the conveyances of November 1858 and January 1860 void, and dismissed plaintiff's suit, thereby reversing the judgment of the Lower Court which found in favor of the plaintiff. In point of law, the finding of the Principal Sudder Ameen cannot be supported, and, therefore, in special appeal, the plaintiff must be successful, for it is not a legal sequitur that, because the sale to the plaintiff's vendors was fraudulent, the purchase of the plaintiff must be null and void.

If the plaintiff was a *bonâ fide* purchaser for valuable consideration, without *any notice* of the fraud, then he should not be deprived of the benefit of an honest purchase; but if he was aware of any such fraud, then the conveyances or sales to him by the parties to the fraud cannot be allowed to invalidate the defendant's title as a purchaser in execution of the decree. We must remand the case to the Lower Appellate Court to try the issue whether the plaintiff was a *bonâ fide* purchaser for value without a knowledge, to be gathered from all the circumstances of the case, of the previous fraudulent and collusive sale to the plaintiff's vendors; and, if he shall find the sale fraudulent and void, he must dismiss plaintiff's case. We have not overlooked the fact that the plaintiff's *vendors* came forward to establish their fraudulent purchase at the execution of the decree under Section 246 of Act VIII of 1859, which in itself is very suspicious as throwing doubt on the fact whether the plaintiffs were in actual possession under their deeds, and the date of *one deed, viz.* January 1860—a date shortly preceding the sale in execution of the decree—renders it necessary for the Court closely to scrutinize the evidence in this case before it is satisfied of the *bonâ fides* of all or any part of the plaintiff's case.

The 18th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Mortgage—Sale.

Case No. 1505 of 1863.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 28th February 1863, reversing a decision passed by the Sudder Ameen of that District, dated the 31st December 1862.

Ramessur Bhomick (Defendant) *Appellant,*

versus

Pooran Chand Golacha (Plaintiff) *Respondent.*

Baboos Gopal Lal Mitter, Issur Chunder Chuckerbutty, and *Mohinee Mohun Roy* for Appellant.

Baboos Unnoda Pershad Banerjee and *Anund Gopal Paulit* for Respondent.

The rights of *bonâ fide* purchasers and mortgagees are not to be defeated by earlier obligations in the hands of third parties never in possession of the land in dispute.

Levinge, J.—In this case it appears that the plaintiff had lent money on mortgage,

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dated the 9th Srabun 1264, of certain lands in the pleadings mentioned. The mortgage was granted by Allad Monee, the wife of Sree Narain, who had by deed conveyed the land to his wife on 2nd Srabun 1263. It further appears that Sree Narain had executed a bond of earlier date, *viz.* on the 8th Bysack 1262, to one Watson for due performance of certain services, and declaring his land liable, in case of any breach of his contract, to stand as a security for that obligation. Sree Narain defaulted in some particular not stated to the Court, or necessary to be enquired into, was sued on the bond, decreed, and, in execution of that decree, the estate mortgaged was put up for sale, and passed into the hands of the defendants under that sale, who ignored the rights of the plaintiff, the mortgagee. Hence the present suit.

The Lower Court found the transfer of the property by husband to wife collusive, but that the mortgage had really been *bonâ fide* entered into and completed by the wife ostensibly, but by Sree Narain actually, and then dismissed the plaintiff's suit. The Lower Appellate Court reversed this finding, holding that it was proved that the plaintiff was no party to any fraud, and that he had advanced the money, and received from the husband and wife a mortgage deed, and held that the plaintiff was not to suffer. It is now argued that the bond created such a lien on the land as disentitled the husband or wife to deal with the property, and that the mortgage was not binding on the land. No question as to the Law of Limitation has been argued or mentioned to the Court, although taken as one of the grounds of appeal. It having been found that the mortgage was really made for the benefit of the husband, the *bonâ fide* and valid existence of the mortgage is established; and we are of opinion that the fact of the husband having entered into the above-mentioned bond of an earlier date, gives the defendant, who purchased under an execution sale in the month of Kartick 1265, no power to set up a judgment obtained on that bond to defeat the rights of a subsequent mortgagee who holds a valid mortgage of the lands. No lien, in fact, ever existed, for the land was never in the possession of the party claiming the lien, and *bonâ fide* purchasers are not to be defeated by any number of such obligations in the hands of third parties. We affirm the judgment of the Lower Appellate Court, and dismiss the appeal with costs.

The 19th May 1864.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Registration (Act XIX of 1843) — Mortgage—Bond.

Case No. 2308 of 1863.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 7th May 1863, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the 6th February* 1863.

Gopal Doss and others (Defendants) *Appellants,*

versus

Doomee Chowdhry and others (Plaintiffs) *Respondents.*

Mr. J. Baptist for Appellants.

Movlvie Aftaboodeen Mahomed for Respondents.

A subsequent registered mortgage was held, under Section 2 Act XIX of 1843, to invalidate a prior unregistered bond.

Glover, J.—This was a suit for the sale of certain property in execution of a decree obtained on a bond. Special appellant (defendant in the Court below) claimed a preferential right on the ground of a mortgage. The first Court held that the plaintiff's (special respondent's) bond was collusive, and the mortgage valid. In appeal the Judge reversed this order, remarking that both the bond and the mortgage deed appeared genuine, but that the date of the one being prior to that of the other, the deed first executed must be first satisfied.

Special appellant urges before us that, granting the genuineness of both deeds, his mortgage must be preferred to the special respondent's bond on the ground of its being registered.

The objection must, we think, be allowed. Section 2 Act XIX of 1843 provides that every deed of sale, &c., a memorial of which has been duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale for the same property which may not have been registered, whether such deed shall have been executed prior or subsequent to the registered deed. This is exactly appli-

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able to the present case. The mortgage, though dated Assar 25th, 1260 F. S., is registered, whilst the bond, dated 20 days previous, *viz.* on the 1st of Assar 1260 F. S., is not so.

We, therefore, decree the appeal, and reverse the Judge's order with costs.

The 19th May 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Usufructuary mortgage (of lakheraj land subsequently resumed).

Case No. 1819 of 1863.

Special Appeal from a decision passed by the Judge of Patna, dated the 10th February 1863, *reversing a decision passed by the Sudder Ameen of that District, dated the 28th August* 1862.

Joy Prokash Narain (Defendant) *Appellant*,

versus

Radha Kishen (Plaintiff) *Respondent*.

Baboo Debendro Narain Bose for Appellant.

Baboo Sreenath Doss for Respondent.

Where property granted in zur-i-peshgee lease was originally rent-free, but subsequently resumed and assessed by Government, the mortgagee was held bound either to make a fresh agreement to take the profits, minus the Government revenue as his security, or to call in his money. His not adopting either course for a long period was construed into assent on his part to receive the profits, *minus* the Government revenue as security.

Kemp, J.—THE plaintiff, special respondent, sued for possession of two plots of land which he averred belonged respectively to the shares of Golam Hossein and Mussamut Wazeehun, and to cancel a zur-i-peshgee lease, as also two bonds executed by the plaintiff's vendor.

The points which have been contended before us are :—

1st.—That, as the property originally granted in zur-i-peshgee lease was rent-free, and was subsequently resumed and assessed by Government, the defendant, special appellant, is entitled to claim the sums paid by him to Government on account of revenue.

2nd.—That the Judge was wrong in holding that Mussamut Wazeehun was not liable.

We think that the decision of the Judge on both points is right. By the terms of the deed of zur-i-peshgee, which is nothing more or less than a usufructuary mortgage, and the term of who was for five years from 1823, the defendant was entitled to all the profits, and it appears that he enjoyed the mortgaged property for 19 years before it was resumed and assessed. He was clearly at liberty, if, after resumption of the security, he was bound to make a fresh agreement to take the profits, *minus* the Government revenue as his security, or to call in his money. From his not having adopted either course for a long period, we are justified in presuming that the original contract was varied, and that he assented to receive the profits, *minus* the Government revenue as security. On the second point there is no room for argument or doubt. The land not being Wazeehun's, the bond will not charge her. The appeal must be dismissed with costs and interest.

The 20th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges*.

Act XX of 1841—Inheritance—Will—Certificate—Limitation.

Regular Appeals from decisions passed by the Principal Sudder Ameen of Chittagong, dated the 29th September 1863.

Case No. 585 of 1863.

Mahomed Azeemoollah Khan and others (Defendants) *Appellants*,

versus

Mussamut Suhoohra Bebee (Plaintiff) *Respondent*.

Baboos Juggodanund Mookerjee and *Unnoda Persad Banerjee* for Appellants.

Baboo Kishen Sukha Mookerjee for Respondent.

Case No. 6 of 1864.

Buzercho Meher and another (Defendants) *Appellants*,

versus

Mussamut Suhoohra Bebee and others (Plaintiffs) *Respondents*.

Baboos Juggodanund Mookerjee and *Unnoda Persad Banerjee* for Appellants.

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Baboo Kishen Sukha Mookerjee for Respondents.

Suit laid at rupees 14,999-2.

The effect of an order under Act XX of 1841 is not to establish a will incontestibly against the whole world, or prevent a will from being impeached in a suit if set up to defeat the rights of parties claiming under the Law of Inheritance. A daughter, claiming as heiress-at-law, may sue in the Civil Court, within 12 years from the death of her father, to establish her title to possession of land left by her father, and to set aside an adverse will upon which a certificate was granted under that Act.

Levinge, J.—THIS is a suit to obtain possession, of 2*a*. 6*g*. 2*c*. 2*k*. share, according to Mahomedan Law of Inheritance, alleged to be the right of the plaintiff Suhoohra Bebee, daughter of Lall Mahomed, in the properties left by him and set out in the plaint. The plaint states that, contrary to the law, the plaintiff's brothers fabricated a will dated the 15th Magh 1211 M. E., and procured a certificate under Act XX of 1841, and, since the death of her father, have wrongfully kept her from possession, and concludes by stating that the suit is brought "to recover possession of the lands, wasi-"lat, personal property, &c., by setting aside "that will. The cause of action has ac-"crued from the 21st December 1854, the "date of obtaining the certificate on the "will after her father's death."

The plaint was filed in the Civil Court of Chittagong on the 9th January 1863.

Defendants No. 1, who are divided into two classes, have set forth separate grounds of defence. The first set of defendants, who represent the sons, daughter, and wife of Lall Mahomed, contend that the plaintiff is not entitled to succeed under the Law of Inheritance to the share claimed, inasmuch as Lall Mahomed, by the will referred to in the plaint, left his property among his family as in the will contained, which excludes the plaintiff from more than a 2 anna share in the whole of the property.

It has already been stated that the plaintiff impeaches this will as an invalid instrument, and we shall have occasion presently to dispose of this issue in considering appeal No. 6 of 1864. The same defendants plead the Law of Limitation, and urge on appeal that, inasmuch as the defendants obtained a certificate under Act XX of 1841, nine years ago, a suit brought to disturb the will on which that certificate was granted cannot be maintained, inasmuch as Act XIV of 1859 Section 1 Clause 5 declares that suits to alter or set aside summary decisions and *orders* shall be brought within one year from the date of the order.

We are clearly of opinion that there is nothing in the objection urged to prevent the plaintiff, as heiress-at-law, from proceeding in the Civil Court within twelve years from the death of her father, the period from whence her rights as such heiress began to run, to establish her title to possession of the land, and that she is at perfect liberty to question the validity of the will, and is not barred by any Law of Limitation under any provision applicable to the order of the Court under Act XX of 1841. The effect of an order under that Act is not to establish a will incontestibly against the whole world, or prevent a will from being impeached in a suit if set up to defeat the rights of parties claiming under the Law of Inheritance.

Act XX of 1841 was passed simply with a view to facilitate the collection of debts and for the security of parties paying debts to the representatives of deceased persons. All that the Court does under that Act is to determine the right to the certificate and make an order in accordance with that determination. The Court does not pass a decree establishing the will in solemn form binding the rights of all parties. The 3rd Section of the Act seems to define the effect of the order of the Court, *viz.* that the certificate shall be conclusive of the representative title against all debtors to the deceased and afford full indemnity to them; but in no part of the Act is it to be found that the Court has been invested with any power or authority to establish the will by a binding decree; nor is it anywhere declared that the order granting the certificate shall have any other effect than that declared in the 3rd Section; and we are of opinion that the legal effect of that order cannot be pushed to the extent contended for in this appeal, and we, therefore, overrule the objection taken on the plea of limitation; further observing that this is not a suit to set aside the certificate or order under Act XX of 1841 which is only applicable to *personal estate*, but is a suit to recover possession of *real estate*, and therefore the provisions of Act XIV of 1859 Section 1 Clause 5 do not apply to this case.

The above objection in bar to the suit having been urged by the appellants in both the appeals before the Court, we have first disposed of it, and now proceed to consider their separate objections to the decree.

The case made for the appellants in appeal No. 585 of 1863, and who compose the second class of defendants No. 1, is shortly as

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follows: They contend that certain lands claimed by the plaintiff, and which is now in their possession under a tuksimnamah of 1208, never was the property of Lall Mahomed, the father of the plaintiff, but in reality was the self-acquired property of Mobaruck Ali, his son; that Mobaruck dying in the life-time of the father leaving Azeemoollah an infant, the property was taken charge of by the father; that it transpiring that Lall Mahomed was making illegal disposition of this property to the prejudice of the infant heir, those interested for him obtained the tuksimnamah referred to, as a declaration from Lall Mahomed of the rights of Azeemoollah. Lall Mahomed died in 1216, and Azeemoollah came of age in 1215 and obtained possession of his 8 anna share under the tuksimnamah.

The Principal Sudder Ameen has decreed against the validity of this document, and has found that the property comprised in it belonged to Lall Mahomed, and was not the self-acquired property of his son.

We differ entirely from the judgment of the Lower Court on this part of the case, and believe that Mobaruck did acquire this property, and that the deed is a genuine and *bonâ fide* instrument. We should not disturb the finding of the Lower Court on evidence and facts, unless we were satisfied that the Court was wrong, both on the facts stated and the probabilities of the case. The Court has clearly misunderstood and misstated some of the most important portions of the evidence, and has come to clearly erroneous conclusions; consequently we cannot attach any weight to his finding on this issue.

The plaintiff has admitted that Mobaruck did acquire considerable landed property. It has not been shewn that he was not in a position to have acquired the property covered by the tuksimnamah. It has been stated and not denied that Mobaruck did acquire considerable wealth by serving as a sheristadar and Deputy Collector, and was employed by the Government in the late Burmese war; and not a scrap of evidence has been brought to the notice of the Court, establishing the fact that Lall Mahomed raised the funds to acquire this property, or had the means otherwise to purchase it. An attempt was made on the argument of this appeal by the respondent to set up a case that, even if Mobaruck did acquire the property, it was by the joint funds of the family, and that being a joint family, of which we may say there is no very distinct evidence, the property became joint. But this view is a clear departure from the case made in the pleadings and in the Court below, where it was contended by the plaintiff that this property belonged exclusively to the father. The defendants have shown by the production of the title deeds that this property was acquired by Mobaruck in his life-time, and that the Government settled with him for these lands, and this at a time when Lall Mahomed had other and distinct properties in his own possession; and a mass of receipts have been given in evidence showing the payment of the revenue by Mobaruck and one Bux Ali, a co-proprietor, with whose share or interest the plaintiff has no concern.

There is one lot of land described as No. 403, originally No. 57, about which some little confusion has arisen. But it appears from the Collector's registry that this lot was acquired by Mobaruck and Bux Ali. After Mobaruck's death, Lall Mahomed, having constituted himself manager, allowed this lot to be sold for arrears of rent, and his servant having purchased it, re-conveyed it to Lall Mahomed; but this fact in no way alters the original character of the property and fully accounts for Lall Mahomed subsequently comprising this property in the tuksimnamah.

The Principal Sudder Ameen has made a series of mistakes, which appear to us unaccountable, when he comes to deal with the important evidence adduced by the defendants in support of Mobaruck's title to this land. He asks:—"What is the reason that "the defendant, who is said to have held se-"parate possession of the lands in accordance "with the terms of the deeds of partition, "cannot produce a single receipt of payment "of rent separately? All the receipts are "ijmalee." The defendants have produced a mass of receipts for rent both before and after the death of Mobaruck Ali. During Mobaruck Ali's life-time all are in his name and that of Bux Ali, his co-proprietor: and better proof of title in this case could not well be adduced. Again the Principal Sudder Ameer has stated that "from the docu-"ments filed by the plaintiff, *viz.* the jumma-"bundee, copy of mutation rubookaree, copy "of towjee, the decision of the Sudder "Court of 1851 (which was filed in an "execution of decree case) and the fur-"khuts, it is clearly apparent that the lands "in question were settled with the plaint-"iff's father, and *belonged to him.*"

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First, we observe that, in point of fact, no jummabundee was filed in this case; *secondly*, the mutation rubookaree was perfected after and on account of the death of Mobaruck and *during the minority of Azeemoollah, viz.* on the 19th May 1846, Mobaruck having died as long back as the year 1838. We have read the decision referred to, which certainly in no way shows that the subject matter of that proceeding was in any way connected with the lands in dispute, and the furkhuts show, as before stated, the transfer of the land from Lall Mahomed's servant to his master after Mobaruck's death.

As to the fact of the execution of the tuksimnamah, we have had all the evidence read, and have no reason to doubt its validity and genuineness. It has been deposed to by near relatives of the plaintiff and defendants. The origin of this document no doubt sprung from the remonstrance of Azeemoollah's near relations who found that Lall Mahomed was dealing improperly by the minor, as would appear from the execution of an earlier tuksimnamah or deed of gift, to his two surviving sons. We also think that, if the property in dispute had really been the *bonâ fide* property of Lall Mahomed, he never would have shrunk from the earlier deed and executed subsequently the deed now under consideration. With regard to the custody of this document, it has been established that it was delivered to Ali Mahomed, the father-in-law of the plaintiff, for safe custody, and after his death, it was made over either by the plaintiff or her son, Mahomed Mokeem, to Azeemoollah; and yet the Principal Sudder Ameen disposes of this part of the case by briefly observing "the deed of partition, even if "executed *bonâ fide, is of no use*, as it has "not *been duly delivered as required*."

Upon the whole of the evidence, we are perfectly satisfied that the defendants, appellants in appeal No. 585, are entitled to retain possession of the land comprised in the tuksimnamah, and we accordingly reverse so much of the decree of the Lower Court as awards that property to the plaintiff with all costs.

Next, with regard to the appeal of the defendants in the appeal No. 6 of 1864. They set up the will already mentioned, which is put forward as having been executed by Lall Mahomed in 1211 M. E., 3 years after the tuksimnamah. That instrument deals with Lall Mahomed's own property, and does not refer to the lands mentioned in the tuksimnamah. The will purports to be made with the object of avoiding all disputes between the sons. The instrument gives certain shares of the property among Lall Mahomed's children, and burdens the whole with the maintenance of mosques, charging the lands with Rs. 250 annually for that purpose, one-fifth of which is to be borne by the plaintiff. She only takes under the will 2 annas share of the property, whereas by the Law of Inheritance 2*a*. 6*g*. 2*c*. 2*k*. would have been her portion, and this unfettered by the endowment. The plaintiff, therefore, has a substantial interest in defeating the will.

The Principal Sudder Ameen has found against the validity of the will, holding that it is a fabricated document, and we see no reason for reversing that portion of his decree. It has been urged by the pleader for the appellants that the fact of the plaintiff not commencing proceedings earlier to set aside the will, is a strong feature against the plaintiff, particularly as she was defeated in her opposition to the granting of the certificate. But the fact that she at the very first attempt to propound or establish the document in any form denied its authenticity, is not to be forgotten; and we think that the interval from the death of Lall Mahomed in 1853 to the bringing of this suit, remembering that she had, in that interval, contested the right to have a certificate granted, and which was not decided until 1855, does not prove that this lady slept on her rights in such a way as to warrant the Court in drawing any unfavorable inference from her alleged laches. She made one struggle at the earliest opportunity, and having failed in that, and finding the whole family against her, it is very natural she would be reluctant to come again into Court with the expedition, it is said, she should have manifested.

Again, it is said that the plaintiff is the only one of a large family who disputes the will; but it is not shown to us that any of the others, who take shares under the will, are prejudiced by it: on the contrary, they appear to be the gainers.

It was urged against the plaintiff that her mother admitted the validity of the will, but this is a mistake. Her mother is dead. It is her step-mother who supports it, and whose off-spring benefit by the instrument.

Again, it has been urged that the plaintiff adopted the will and is estopped by her acts, as she enjoys the share given her under the will, and is in possession of the land devised to her. Here, again, the defendants fail, as the

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fact of her possession of so much property is as reconcilable with her rights as an heiress-at-law, as it would be as a devisee, and, therefore, in the absence of any proof that she occupies *as devisee*, no legal inference in support of the will can be drawn from her occupation, upon the principle that, if evidence is evidence of two states of facts, it should not be acted on by the Court in support of either point. No receipts, documents, or vouchers are produced by the defendants shewing she ever admitted that she occupied the 2 anna share as devisee.

We think the circumstances surrounding this will are in themselves amply sufficient to warrant us in upholding the decision of the Lower Court, in whose judgment on this issue we see no error. The Principal Sudder Ameen remarks that it has not been registered, but it is said that it has been attested by the Cazee. It was prepared, according to the date on the will, in Magh 1211 M. E., and not attested by the Cazee until the month of Kartick 1212; and the Principal Sudder Ameen sent for the Cazee's register, but has ascertained that no such book can be produced. But these circumstances we consider of minor importance, as we have no doubt that those propounding this will have tampered with it since it was presented as Lall Mahomed's will, in order to obtain the certificate to collect debts, and done so with the view to give it authenticity, knowing that its validity would be contested in a regular suit. It has an entry on the face of the document that the will has been executed with the consent of the different members of the family, and the plaintiff's name appears among them. The Principal Sudder Ameen has held that this is a fabrication and a recent one, and we fully coincide with that opinion. Irrespective of the appearance of that entry as fortifying that view, it is impossible to conceive that, if the plaintiff had given her consent to the validity of the will, in writing, on the instrument, she would have been afterwards heard in opposition to the granting of the certificate, on the ground that the will was fabricated, and that the Judge would not have noticed this flagrant attempt to defeat a document which she had admitted in the presence of witnesses to be genuine.

We have no doubt that the defendants, knowing that they would otherwise fail to establish this will, were driven to the desperate resort of forging the plaintiff's consent, the consent of heirs to the disposition of this property in the mode provided by this alleged will being necessary under the Mahomedan Law.

We think it unnecessary to further consider the evidence and judgment on this part of the case. It has not been shown that any copy was filed in Court in the proceedings under Act XX of 1841, nor is there any colorable pretence for supposing that any authentic Court copy of this will made prior to March 1855 can be produced, which would establish the fact that the consent charged as a forgery would appear to have been on the will when the same was filed for the purpose of obtaining the certificate. In the absence of a shred of evidence, or any good reason put forward for supposing that such a document exists, we decline to postpone the decision of this case. Furthermore, the parties knew at the hearing below, of the charge brought in this respect against those who put forward this will, this matter being the foundation of argument before the Principal Sudder Ameen at the trial, and no postponement asked for, or any requisition made for search for such a paper; and as, if it existed, it might have been by the exercise of ordinary diligence produced, we could not allow even a new trial on this issue, when every opportunity existed at the trial below for its production.

We, accordingly, uphold so much of the decree of the Lower Court as finds in favor of the plaintiff against the validity of the will, thus establishing her title as heiress-at-law to the *2a. 6g. 2c. 2k.* No other matters or objections to the decision of the Lower Court has been urged before us, save the findings on the validity of the tuksimnamah and the will; and accordingly the residue of the judgment of the Lower Court will be affirmed, and the plaintiff will be entitled to her costs of this appeal against the defendants Buzercho Meher, Mahomed Kanoo Chowdhry, Retun Beebee, and Arjena Beebee, in proportion to their shares.

The 20th May 1864.

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Section 348 Act VIII of 1859—Objections by Respondents.

Case No. 1971 of 1863.

Special Appeal from a decision passed by the Judge of Patna, dated the 27th April 1863, *modifying a decision passed by the Principal Sudder Ameen of that District, dated the 30th January* 1863.

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Hunnooman Sing (Defendant) *Appellant,*

versus

Baboo Suddoololl (Plaintiff) *Respondent.*

Mr. John Baptist for Appellant.

Mr. C. Gregory for Respondent.

Section 348 Act VIII of 1859 in no way restricts respondents as to the points on which they may, by way of cross-appeal, object to the decision appealed against.

Norman, C. J.—THIS was a suit on a bond. The appellant, Hunnooman Sing, being made a co-defendant with Sitana Begum, the first Court ordered that the costs of Hunnooman should be paid by Sitana Begum, and decreed execution against Sitana Begum. Both Sitana Begum and Hunnooman appealed to the Judge, Hunnooman only on the point of costs on a stamp of 4 rupees. The Judge, however, in the cross-appeal of the plaintiff, ordered, as against Hunnooman, that the property mentioned in the bond, and which he claimed under an alleged deed of sale from Sitana Begum, should be sold in execution of the decree. Mr. Baptist now objects that the appeal of Hunnooman being only on the question of costs and on a stamp of 4 rupees, the Judge could not go into the merits of the case in the cross-appeal. But Section 348 in no way restricts respondents as to the points on which they may, by way of cross-appeal, object to the decision appealed against.

The present appeal is, therefore, rejected with costs and interest.

The 21st May 1864.

Present:

The Hon'ble J. P. Norman, *Offg. Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Review—Appeal.

Case No. 1739 of 1863.

Special Appeal from a decision passed by the Judge of Patna, dated the 19th February 1863, reversing a decision passed by the Moonsiff of that District, dated the 30th August 1862.

Mahadeo Lall (Defendant) *Appellant,*

versus

Lalla Gour Persad (Plaintiff) *Respondent.*

Mr. T. T. Forbes for Appellant.

Moulvie Murhummut Hossein for Respondent.

There is nothing irregular in granting in 1862 a review of a decision passed in 1854, and the order admitting the review was final under Section 378 Act VIII of 1859.

Norman, C. J.—IN this case Gour Persad obtained a decree for mutation of names in the Collectorate on the 22nd of November 1854 against certain parties of whom the now appellant Mahadeo was one. Mahadeo was then a minor, and was represented in the suit by Sonder Loll and Gopal Loll, who professed to be his guardians. He came of age in 1858, and instituted a suit for the reversal of the decree of 1854. This suit was dismissed by the Moonsiff, and the dismissal confirmed on appeal by the Judge, on the ground that the proper mode of proceeding, in order to question the propriety of the former decision, was to apply for a review. Mahadeo accordingly applied to the Moonsiff for a review. A review was granted, and the former decision reversed on the 30th of August 1862. On appeal the Judge reversed this decision of the Moonsiff, on the ground that it was irregular to grant a review of a decision passed in 1854.

Mahadeo appeals. We are of opinion that the Moonsiff's order was, under the circumstances, not improper, and that, in fact, under Section 378 Act VIII of 1859, it was final so far as it admitted the review. We therefore remand the case for trial upon the merits.

The 21st May 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Lakheraj—Resumption and Assessment of.

Case No. 192 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 23rd December 1862.

Beer Chunder Joobraj (Plaintiff) *Appellant,*

versus

Umakant Sein Bahadoor (Defendant) *Respondent.*

Mr. G. C. Paul and *Baboo Onookool Chunder Mookerjee* for Appellant.

Baboos Dwarkanath Mitter and *Kalee Mohun Doss* for Respondent.

Suit laid at rupees 9,112-8.

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A zemindar has no right to resume and assess lands alleged to be invalid lakheraj, which are of greater extent than 100 beegahs and are covered by one sanad, particularly where the power to resume mentioned in the engagement is the power vested in the zemindar by law.

Seton-Karr, J.—THE plaintiff is the heir-apparent to the Tipperah Raj, and he sues in this case as zemindar of Roshanabad, within the district of British Tipperah, to assess a very considerable portion of land held by the defendant under an invalid lakheraj title.

A similar case to the present, No. 191 of 1863, was decided by Justices H. V. Bayley and E. Jackson on the 16th of January last, on the principle, chiefly, that the lands claimed for assessment being admittedly in excess of 100 beegahs, the right of assessment belonged not to the zemindar, but to Government.

The Principal Sudder Ameen has treated the present case as if it were, in all respects, identical with No. 191, and has thrown out the plaintiff's suit, considering that he was barred by an engagement from even attempting to assess; but it being clear to us that this is not the way to treat it, and the circumstances of the suit being of a peculiar character, we have thought it necessary to hear the appeal on its merits, and to give reasons for our decision at some length.

It appears that each Raja or zemindar of the estate of Roshanabad has been in the habit of entering into a separate engagement with Government on succession to his rights; and that, on the last occasion but one, when this arrangement took place, or in the Tipperah year 1236, corresponding with our year 1833, the grand-father of the plaintiff stipulated with Government that he would not create any new rent-free lands of any description or denomination, mentioning their several kinds, without the advice of the authorities; and that he would not, without permission, attempt to assess any rent-free lands which were then fixed or in existence (*makurrer*), while, if any such were resumed owing to any such permission or order, he would pay rent for the same.

When the father of the present appellant who instituted this suit, having since demised, came to make his own arrangement with the Government, which he did on the 8th of Joisto 1262, he concluded it in the following terms, as appears by his kuboolent:—

He stated that, as Government had been itself intent on resuming the rent-free lands within Roshanabad, he interfered to stay the proceedings with regard to such lands as were fit for assessment, and that he agreed to pay a revenue of 8,000 rupees on the same; that Government agreed to this, but that, as a certain portion of these lands had been already resumed and assessed at a jumma of rupees 3,373-8-3, a deduction to this amount was to be made from the zemindar's agreement, the assessed lakherajdars paying direct to Government, while, for the remainder, in regard to which the resumption proceedings had not terminated, the Raja was to pay the sum of rupees 4,626-7-9, according to certain letters of Government quoted.

Then, subsequently, after other details not necessary to be mentioned, it is stated in this kuboolent, as in previous engagements, that the Raja, without the advice of the authorities, would not create any new grants, and "that he will not go beyond whatever power "has been entrusted to him by the laws and "orders of the Government, in regard to "the resumption of existing rent-free lands."

On this Clause, and on the letters of the Commissioner and Sudder Board, and of the Government, a very earnest contention has been raised before us by the Counsel for the Raja, Mr. Paul, on the one hand, and by the pleader for the respondent on the other.

For the Raja it is contended that although, for some reason not at present disclosed, the Government in all previous engagements had restrained the successive Rajas, as zemindars of Roshanabad, from interfering with the rights of the various rent-free holders, and had reserved to itself the exclusive right of instituting all resumption proceedings in the zemindary, yet, by the engagement of 1262, this power had been relaxed; that the Raja had agreed to pay, in anticipation of resumption suits which he would henceforth be allowed to institute, the sum of Rs. 4,626-7-9; that this was clearly to be gathered from the letter of Mr. H. Ricketts, who then held the office of Commissioner and Sudder Board in one, dated the 2nd of August 1844, and from the reply of Government approving of his proposals, dated the 16th of September, as well as from the peculiar phrases introduced into the new arrangement of 1262, which phrases were not found in the previous deeds of the same nature; and that, as the Raja must be clearly held to have bought something for his money, he ought to be allowed to have his suits tried on its merits.

For the respondent it is urged that the object of the agreement whereby the Raja bound himself to pay the sum of rupees

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4,626-7-9 to Government was simply to stay all resumption proceedings on the part of Government, which proceedings were of a nature to harass and vex the rent-free holders; that he never could have contemplated any benefit to arise thereby to himself, except what might ensue from self-approval or from the applause conferred on an well-applied liberality; that the letter of the Commissioner and Sudder Board, on which so much stress was laid, contemplated the bargain as advantageous only to the Government, who were to get at once a sum little short of 5,000 rupees, without the trouble of conducting to an issue some 50 law suits which were then pending, and which, in their event, were naturally doubtful; that the Government had never, it was clear, at any time permitted the Rajas to take any part in resumption of whatever amount, even of those below 100 beegahs, and that other instances could be quoted where zemindars, in the same part of the country, had interfered, by voluntary additional payments, to stay resumption suits by the Revenue authorities, and to save pious or poor Brahmins from annoyance.

In proof of this, a case is certainly quoted from page 190 of the Sudder Reports for 1849, in which it was held that Rani Katiani, a Hindoo lady of large wealth and influence, had possibly acted from such a motive of disinterested liberality in taking on herself to make payments to save the lakherajdars from vexation.

The opinion of the Judge who decided the above case, is not very positively given on this head; but it is quite certain that the Rani was then considered to have bound herself to abstain from all resumption proceedings; and an attentive perusal of Mr. Ricketts' letter of the 2nd of August 1844 in the present suit leaves us in doubt whether a similar arrangement may not have been then contemplated by this officer. We say that we cannot be certain of the exact light in which the Commissioner then viewed the agreement. In one place he says "that it has been distinctly and point-"edly provided that no authority whatever, "*not hitherto possessed by the Raja* over "the lakheraj lands not resumed, has been "conveyed to him by this adjustment; in "other words that he is not vested with any "license to levy rent or revenue from the "unresumed lands within the chuklah in "order to reimburse himself in the sum "he has agreed to pay the Government; "that interest or absence of interest on his "part in these lands stands precisely in the "position in which it stood before this "agreement was made; and that any de-"mand made by him on those lakherajdars "would be as much extortion as it would "have been had this compromise not been "agreed to between him and Government."

The rest of the letter is taken up with a specification of the terms of advantage to the Government in the arrangement by which it was shown that the Government had secured rupees 4,717-11-7, which is very nearly the sum mentioned in the kubooleut, instead of the doubtful chance of getting 7,800 rupees out of 14 cases pending before the Resumption Officer, out of 41 cases remaining to be instituted, and out of 3 cases pending in appeal before the Special Commissioner.

It is remarkable, however, that the deed of compromise which is alluded to in the above letter, and which is obviously quite different from the engagement of 1262, though this deed alludes to such a compromise, has never been filed, though it would apparently have been as easy for the respondents to file it as the letters quoted, and the *kubooleut* of 1262, which was signed more than 10 years after the letter was written, clearly talks of the power to resume which exists by law, and which has been *entrusted* or *committed* to the Raja.

Neither is it very easy to perceive the distinction drawn in the letter above quoted, or how the receipt by the Government of a considerable sum of money annually, could be spoken of as perfectly legitimate, while any corresponding sum to be derived by the Raja from assessment of the lakherajdars could only be "extortion." We should also have expected that some mention would have been made of the Raja's liberality in the letter, had he voluntarily taken on himself to pay for the lakherajdars without any hope of reimbursement. We admit that, up to 1262, no power to resume had, for some cause or another, been given to the Raja, but had been wholly withheld from him; but according to the common rules of interpreting these agreements, we can scarcely imagine the Raja by his tender to have bought nothing; and when we consider the considerable sum which he was paying down at once, and the import of the particular phrase introduced into the kubooleut of 1262, as already noticed, we think ourselves quite warranted in coming to the conclusion that the Raja had a full right,

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under that document, to exercise and put in force the powers vested in all zemindars to resume invalid rent-free tenures below 100 beegahs in extent, whatever had been the precise nature of the agreement or the extent of his powers in previous years.

We do not think, as contended by Mr. Paul, that Government had waived in his favor the right to resume and assess lands held under one sunnud, in excess of 100 beegahs; or that, because by previous engagements, the Rajas had bound themselves to abstain from all resumption whatever, therefore, when a new engagement was come to, all the rights previously exercised by Government reverted to the zemindar, even including those reserved to the State by the Laws of 1793. Such a determination could only be come to by us on the clearest and most convincing proofs of any such intention; and when we find that the power to resume mentioned in the engagement, is the power vested in the zemindar *by law*, we must hold that power to be only the ordinary power inherent in all zemindars with regard to invalid grants of less extent than 100 beegahs. We may add that we cannot understand it to be either the wish or intent of Government that invalid rent-free tenures, resting neither on title nor prescription below 100 beegahs, should not be fairly assessed.

Such a ruling seems to us quite in accordance with legal construction and with the fair interpretation of the agreement or contract between the Raja and the Government. To rule, after careful inspection of these terms, that the Raja had bought absolutely nothing whatever by his annual payment of 4,726 rupees, would be to put an unfair construction on the whole arrangement.

In this view we hold that the Raja has now no right to enquire into the title to lands in the present or in any other suit, which are of greater extent than 100 beegahs and are covered by one sunnud. Such lands are those covered by the sunnud dated the 5th of Magh 1167 for more than 7 drones of land, in regard to which we affirm the decision of the Lower Court, thereby concurring in the previous judgment of this Court of the 16th of January last.

As regards the lands covered by the other sunnuds, the Raja's right to resume them should be enquired into on the merits, and, for this purpose, the suit should be remanded to the Lower Court.

The 25th May 1864.

Present:

The Hon'ble C. B. Trevor and A. G. Macpherson, *Judges*.

Limitation—Mutual accounts — Co-sharers.

Regular Appeals from decisions passed by the Officiating Judge of Purneah, dated the 25th September 1862.

Case No. 1 of 1863.

Raja Syud Ahmed Reza (Plaintiff) *Appellant*,

versus

Syud Enayet Hossein (Defendant) *Respondent*.

Messrs. R. V. Doyne and *G. C. Paul*, and *Baboos Dwarkanath Mitter* and *Onookool Chunder Mookerjee* for Appellant.

Messrs. T. H. Cowie and *R. T. Allan*, *Moonshee Ameer Ali*, and *Baboo Kishen Kishore Ghose* for Respondent.

Case No. 3 of 1863.

Raja Syud Ahmed Reza (Defendant) *Appellant*,

versus

Syud Enayet Hossein (Plaintiff) *Respondent*.

Messrs. R. V. Doyne and *C. Gregory* and *Baboo Unnoda Persad Banerjee* for Appellant.

Messrs. T. H. Cowie and *R. T. Allan*, *Moonshee Ameer Ali*, and *Baboo Kishen Sukha Mookerjee* for Respondent.

The rule that mutual accounts, if they contain some item or items within 12 years, will not be barred by limitation, though the rest of the items be beyond time, is confined to accounts between two parties which show a reciprocity of dealings, or, in other words, to transactions in which there is a mutual credit founded on a subsisting debt, or an express or implied agreement for a set-off of mutual debts.

Where two parties (8 anna proprietors of the same estate) hold their shares separately, and by tacit if not express agreement collect their yearly share of the rents separately, the realization by one party of more than his rightful share of the rents gives a cause of action to the other from the commencement of the year following that in which the surplus collection was made, such yearly claims being in the nature of separate and distinct demands against which limitation will run.

Trevor, J.—These two cases have come up in appeal from the Judge of Purneah.

The plaintiff in each of them is the owner of 8 annas of Pergunnah Soorjapore. The claim of Raja Syud Ahmed Reza is for rupees 84,332, principal and interest, received by Raja Enayet Hossein in excess of his half

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share of the collections actually made from 1242 up to 1257. That of Enayet Hossein against Syud Ahmud Reza is for rupees 1,18,441-10, principal and interest, on account of excess receipts by him of rent actually collected from 1253 to 1257. The facts out of which the present suits have arisen, are not in contention, and seem to be as follows :—

Owing to disputes between the ancestors of the parties before the Court, the Pergunnah Soorjapore was attached by order of the Civil Court under Section 26 Regulation V of 1812. It remained for many years under attachment, and, during that period, the owners of the 8 annas of the estate received one-half of the amounts collected by the surburakars and also by tacit, if not express, agreement, collected from the farmers and tenants of the estate each his separate 8 annas of the rents. In 1253 or 1846 the surburakar was dismissed by order of the Sudder Court, and the then proprietor, represented by the then plaintiff in the suit, appointed as Amil Meah Hossein Ali, who was removed in 1255, when the estate again was attached and managed by a Mr. Brandt. In Jeyt 1256, Mr. Perry was appointed surburakar ; and on the 28th Phalgoon 1257 the attachment was withdrawn, and the estate came into and has since continued in the hands of the proprietors. During these attachments the irregular mode of collecting the rents direct from the farmers and tenants was continued by both parties, and that practice has given rise to the present suit.

Each party denies the claim of the other on account of excess collections, and the defendant Enayet Hossein pleads as to a considerable portion of the claim of Syud Ahmed Reza the Statute of Limitations.

The first Court was of opinion that the Statute of Limitations did apply to a portion of the claim of Ahmed Reza, and that the Court could not enter into transactions, or revive accounts relating to a period of more than 12 years before the institution of the present suit ; and that, as the suit was instituted in April 1857, the accounts to be settled by the Court must be those subsequent to 1845, and those only. After examining the accounts, the Judge dismissed the claim of Ahmed Reza and passed a decree in favor of Enayet Hossein, whose whole claim was, subsequent to 1845, for rupees 34,630-2-10½, with interest at 12 per cent., and costs in proportion.

From these decisions two appeals have been preferred to this Court, and the first point to which our attention was called was the applicability or otherwise of the Statute of Limitations to any portion of the claim of Raja Ahmed Reza.

There can be no doubt that *mutual accounts*, if they contain some items or even any one item within 12 years, would not be barred by the Statute of Limitations, though the rest of the items were beyond that term. But this rule is strictly confined to accounts between two parties which show a reciprocity of dealings, or, in other words, to transactions in which there is a *mutual credit* founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts.

Is, then, the present claim of Syud Ahmed Reza as against Enayet Hossein a claim of this nature ? The parties are 8 annas proprietors of the same estate. They have held their shares separate. They have by tacit, if not by express, agreement collected their yearly share of the rents by their separate endeavors, and, in short, by their acts have taken up a position altogether unconnected with and antagonistic to each other. This mode of action, no doubt, gives the party who has received less than half the yearly net rents of the estate, an action against the party who has collected more than his rightful share of those rents ; but his right to these surplus rents arises in consequence of a wrongful act of the other party, and at the end of each year a wrongful act of this nature is a cause of action from the commencement of the year following that in which the surplus collection was made. It follows that these yearly claims are in the nature of separate and distinct demands against which the Statute of Limitations runs, and that they can, by no process of reasoning, be brought within those special and particular accounts as against which limitation will not run.

Turning, then, to the remarks which have been addressed to us by the learned Counsel on the part of both the plaintiffs, and to the accounts filed and the case made by each of them against the other, it appears to us that they are founded on a mistaken view of the case as between the parties before us. The contention before us has been that each party as against the other is entitled to one-half of the *actual collections* made ; but in our view this is not the case. Considering the independent and antagonistic position which each party has taken up against the other, and the tacit, if not express, agreement entered into between them as to the mode

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of collection, it seems clear that neither party has a claim against the other on account of superior diligence exercised by him in the collection of the yearly rents; but that the only ground on which a right of action accrues to either party is the realization by the other side of a sum larger in extent than one-half of the yearly rents, that is, of a sum beyond that to which he is of right entitled.

That such has been the case—that Mahomed Reza and Enayet Hossein have, during any of the years covered by these suits, collected a sum beyond their legal right, that is, one-half of the net rental of the estate—has not been attempted to be shown to us; but the learned Counsel have only entered into elaborate calculations, founded upon very infirm data of collections actually made, and have thereon asserted the right of their respective clients to one-half of the net actual collections. Such a view of the case, as we have above observed, is altogether inadmissible. Without, therefore, entering into the accounts placed before us, and resting solely on the mistaken nature of the case as between the parties laid before us, nothing remains for us but to affirm the order of the Principal Sudder Ameen in the case of Ahmed Reza, and to reverse his judgment in that of Enayet Hossein. Both parties will, under the circumstances, bear their own costs in both Courts; and it will remain for both parties, if they should be so advised to bring actions against each other in the proper form indicated in the above judgment.

The 25th May 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Jurisdiction (of Small Cause Court)—Suit for damages not exceeding 500 Rs.—Question of right—Special Appeal.

Case No. 2353 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Mymensingh, dated the 17th June 1863, reversing a decree of the Moonsiff of that District, dated the 17th November 1862.

Luckhee Debia Chowdhrain (Plaintiff) *Appellant,*

versus

Shaikh Malick (Defendant) *Respondent.*

Baboos Issur Chunder Chuckerbutty and *Dwarkanath Banerjee* for Appellant.

Baboo Annund Gopal Palit for Respondent.

A suit for damages for an amount not exceeding 500 Rs. is within the competency of a Small Cause Court to decide, notwithstanding that it involves an enquiry into a question of right. No special appeal lies in such a case.

Morgan, J.—This is a case in which a special appeal does not lie. Being a suit for damages for an amount not exceeding 500 rupees, it is within the competency of the Small Cause Court to decide, notwithstanding that it involves an enquiry into the question of right which is raised; and by Section 27 Act XXIII of 1861, it is enacted that no special appeal shall lie from a decision on regular appeal in a suit of the nature cognizable by Small Cause Courts for an amount not exceeding 500 rupees.

The special appeal is accordingly dismissed with costs.

The 25th May 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Limitation (Section 246 Act VIII of 1859.)

Case No. 2364 of 1863.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 19th May 1863, affirming a decree of the Moonsiff of that District, dated the 28th February 1863.

Dwarkanath Roy (Defendant) *Appellant,*

versus

Sreenath Roy (Plaintiff) *Respondent.*

Baboo Nil Madhub Sein for Appellant.

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Baboos Romanath Bose and *Kalee Kishen Sein* for Respondent.

The limitation prescribed by Section 246 Act VIII of 1859 cannot be applied retrospectively to suits to question orders made before that Act came into operation.

Morgan, J.—It is clear from the terms of Section 246 of Act VIII of 1859 that the limitation of one year therein prescribed applies to suits to question orders made under that Section. This is an order made before that Act came into operation. We cannot give retrospective effect to the rule of limitation laid down in the Section above referred to. The appeal is accordingly dismissed with costs.

The 25th May 1864.

Present:

The Hon'ble E. P. Levinge and G. Campbell, *Judges.*

Evidence—Private Butwara papers.

Case No. 2317 of 1863.

Special Appeal from a decision passed by the Judge of Mymensing, dated the 15th May 1863, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 15th January 1863.

Dwarkanauth Roy Chowdry and others (Defendants) *Appellants,*

versus

Hurronath Roy Chowdry (Plaintiff) *Respondent.*

Baboos Onokool Chunder Mookerjee and *Kishen Dyal Roy* for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

Private butwarrah papers are good evidence towards showing what lands are in fact comprised in the estate at the time of the butwara.

Campbell, J.—We think that the Judge was wrong in excluding the butwarrah papers of 1203 as evidence in this case. Plaintiff claims shares in certain villages as having been included in the Burra Panch Anna estate of the Permanent Settlement, of which estate plaintiff's present estate is a sub-division. No papers of the Permanent Settlement are produced to show plaintiff's right in the villages claimed. The nearest approximation to these papers produced by plaintiff is the quinquennial papers of 1202 of his parent estate, registers of some, but not of conclusive, authority. To rebut the evidence of these quinquennial papers of 1202, defendant produces butwarrah papers of 1203, when the shareholders of Burrah Panch Anna sub-divided their own estate, and shows that they then did not include in the estate so divided the villages now claimed. We think that, in the absence of any details of the villages included in the estate at the time of the Permanent Settlement, for the purpose of showing what villages really were comprised in the estate, the butwarrah papers of 1203 are quite as good evidence as the quinquennial papers of 1202 or better; and that they are so whether the butwarrah was a regular or a private butwarrah. The Judge should have weighed the butwarrah papers against the other evidence, and should not have rejected them. We therefore remand the case to the Lower Appellate Court for a fresh decision, after having received and considered, as evidence, the butwarrah papers. We have not overlooked the argument that the butwarrah of 1203, if, as is alleged, a mere private butwarrah, would not be conclusive to settle the rights of the shareholders as against an auction-purchaser; but we think that the butwarrah papers are, in any case, good evidence towards showing what lands were in fact comprised in the estate at the time.

The 25th May 1864.

Present:

The Hon'ble F. B. Kemp and A. T. T. Peterson, *Judges.*

Pre-emption.

Cases Nos. 2030 to 2033 of 1863.

Special Appeals from a decision passed by Morris Beaufort, Esq., Officiating Judge of Behar, dated the 21st of April 1863, affirming a decision passed by Baboo Tarakant Bidyasagur, Principal Sudder Ameen of that District, dated the 19th November 1861.

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Moonshee Syud Ameer Ali (Plaintiff) *Appellant*,

versus

Mussamut Bebee Pearun (Defendant) *Respondent*.

The Advocate-General and *Mr. R. E. Twidale* for Appellant.

Messrs. R. V. Doyne and *C.* and *G. Gregory* for Respondent.

A transaction in which there was neither a money-consideration nor any thing in the place of a money-consideration, but which was in fact a transfer without consideration and therefore a gift, was held to be not a sale to which the right of pre-emption attached.

Peterson, J.—THE case No. 2030, together with Nos. 2031, 2032, and 2033 were all argued together by the same Counsel and vakeels on behalf of the respective parties, appellant and respondent. The decision in the one case will govern that of the others.

These are suits brought by the plaintiffs in the double capacity of neighbours and co-sharers claiming the right of shuffa under Mahomedan Law, and the facts are as follows :—The respondent, Mussamut Bebee Pearun, defendant below, was the owner of an 8 anna share in certain lands, houses, &c., situate in Zillah Behar. By a kubala bearing date the 25th August 1859, she conveyed to her daughter, Kunny Fatima, her entire moveable and immoveable property, the alleged consideration from the daughter being a lakh of rupees mentioned in the kubala, but which in a further portion of the instrument is remitted. In fact, there was no valuable consideration given. Under this deed the daughter had taken possession of the 8 anna share assigned to her. In this state of things, the plaintiffs, as neighbours of different portions of the property, claimed their right of shuffa, treating the transaction as a sale—not as a gift. The defendant meets this claim by asserting that it was a gift, and that the law of shuffa did not attach.

The Court of first instance held that the transaction amounted to a gift only, and dismissed the claim of the plaintiff with costs. The respondents, defendants below, severally filed their appeals against the decision of the Lower Court, and the Court of Appeal, on hearing, confirmed the decision of the Court below, but, inasmuch as it alleged the whole litigation had arisen out of a fraudulent attempt on the part of the defendant to defeat the claims of others, the respondents will bear their own costs both in the Lower Court and in appeal.

The plaintiffs and defendants have each filed grounds of appeal.

The plaintiff's grounds of special appeal were as follow :—

I. The deed of sale purports to be a sale for a consideration, and was carried out so far that the purchaser obtained possession under it, as admitted by the Judge. Hence the Judge erred in stating that it was not such a sale as to give rise to a right of pre-emption.

II. The Judge's distinction regarding sales with consideration, and sales through affection, does not at all apply to this case ; the right of pre-emption arising, according to Mahomedan Law, in every sale. *Vide* Decisions of 1860, page 659.

III. The question as to who has a preferential right of pre-emption, does not arise in this case. Hence the Judge's giving weight to this is irrelevant.

IV. The decision of 1850 has been misinterpreted by the Judge, as it nowhere states that the tender of money is essential to give a right of pre-emption ; on the contrary the precedent in page 427 of the decisions of 1858 shows that it is not necessary to prove the actual tender of purchase-money.

V. In a case where the value of property has been fixed at an exorbitant sum, it is incumbent on the Judge to ascertain the actual amount paid, or the market value. *Vide* Decisions of 1860, page 299.

VI. The holding the disputed sale to be a gift contrary to the terms thereof and to the allegations of defendants themselves is wrong.

VII. According to the Mahomedan Law the daughter is a stranger before the plaintiff who is shufee-khuleek.

Notwithstanding the numerous grounds of appeal taken by the present appellant, this case must be decided on this single ground,—does the kubala under which the property was conveyed amount to a sale, or is it a gift ? If the former, the plaintiffs are entitled to pre-emption ; if the latter, they are not.

On behalf of the appellant it was contended

First.—That the conveyance was an actual sale, and that being so, the remittance of the consideration-money did not make it less a sale.

Secondly.—That even if it were a fictitious sale, the right of pre-emption attached.

Thirdly.—That admitting it as a gift, still pre-emption attached.

On the *first* point it was contended that it was a sale, with the intention of preventing

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the rights of others attaching, and that the instrument must be construed according to the intention of the parties. It was also contended that this was a hibba-bel-ewaz, and, as such, a sale; and an authority from Vol. 6, Sudder Dewanny Select Reports, was cited, in which it was held that a hibba-bel-ewaz was such a sale as to allow shuffa to attach. If this instrument had been a hibba-bel-ewaz, the case must have been decided upon the authority of the above case; but, in the Court's opinion, it is not. It was contended that the fact of Kunny Fatima having entered into possession, was evidence of a sale. But her entry is equally consistent with a gift according to Mahomedan Law. A decision of Sir Robert Barlow, reported in page 141 of the Sudder Dewanny Reports for 1848, was cited, to show that, in a similar case, the right of pre-emption existed. The decision in that case seems rather to the effect that such an instrument was not invalid in law, rather than that it amounted to a sale on which shuffa would attach.

On the *second* point, *viz.*, that, even in a fictitious sale, the right of shuffa attached, the case of Setul Persad Bhuggut *versus* Romanath Rugkhet, reported at page 659 in the Sudder Dewanny Reports of 1860, Vol. I., was cited. This case does not support that doctrine.

On the *third* point, namely, that even if a gift in substance, still the right of pre-emption existed. It was attempted to support that point by reference to the Hedaya, Vol. III., page 606, in which it is laid down that, if the vendor remit a portion of the purchase-money, the pre-emptor is entitled to a like remission: and *aliter* if the whole was remitted, in which case it was contended that, as the Mahomedan Law allowed a remission of a portion, the principle of remission even of the entirety showed that it was nevertheless a sale. Were the law so, in a case like the present one, a neighbour would be entitled to get the whole for nothing. The plaintiff, however, contended that he was entitled to have the estate at the price alleged as the consideration money. The Mahomedan Law, after stating that, if the whole had been remitted, the pre-emptor would not be entitled to a remission of the whole, goes on to state its reasons, to which the Court will refer in a subsequent part of this their judgment. On the subject of the necessity of a tender to entitle a party to pre-emption, the point was properly given up by the respondent, it being admitted that, according to law, an actual tender was not necessary.

On the part of the respondent, it was contended that there was no decision in point; that the case must be decided on principle; and that the instrument in question amounted in reality to what it was in substance—a gift; that it must be so treated, unless there was some substantive Mahomedan Law that made a transaction like this a sale; that the Court could not go into the question of intention, and that there was nothing illegal or fraudulent, according either to Mahomedan or any law, in a person disposing by gift of his own property in his life-time, so as to prevent the right of his heirs attaching after death; that the remission of the whole of the consideration-money made the transaction a gift, or an invalid sale, in neither of which cases did shuffa attach; and that their contention was upheld by reference to the Kefayeh, in which, after stating that the pre-emptor was not entitled to a remission of the whole consideration money, it went on to give its reasoning as follows:—"That an abatement of part is an act connected with, and referring to, the original sale, and the shofee is entitled to the benefit of it, because that sum which remains, after deducting the abatement, is the price; whereas an entire remission has no connection with the original bargain, whereas if a remission of the whole touch or be connected with the original transaction, it shows that the transaction becomes a hibba, and no right of shuffa exists in a hibba, or it becomes a sale without consideration, and then that the transaction becomes an invalid sale, and no shuffa exists in sales that are invalid."

Judgment.

This case has been very fully and ably argued by the Counsel and vakeels on either side; and, as the case is one of which there has virtually been no decision, the Court has taken time to consider its judgment, and has come to the conclusion that this appeal must be dismissed with costs of special appeal. In the opinion of the Court this case must be decided on this ground only—Did the transaction, according to Mahomedan Law, amount to a sale, or to what is equivalent to a sale, or did it amount to a gift?

The right of shuffa entirely depends upon its being a sale. If it be a gift, no right of shuffa attaches. There are several minor collateral points (which though not necessary for the present deci-

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sion of the Court) have been noticed in the judgment of the Court of Appeal below, and which the Court think it necessary to dispose of before coming to its decision.

On the main point,—in the first place, this Court decides that there is nothing illegal, according to Mahomedan Law, or *malum in se* in a Mahomedan, the absolute holder of property, disposing of that property by gift or otherwise in his life-time, even if the effect of that disposition be to deprive those who would be his heirs at his decease from getting the property in question. The Mahomedan Law in cases of gifts *inter vivos*, requires certain formalities to perfect the gift and bar the heirs, such as possession, much in the same way as the English Law, whilst it gives the owner a right to dispose of his property, says, if you attempt to dispose of it by testamentary disposition, you shall not do so unless by an instrument attested by two witnesses ; if you do, the right of the heir shall prevail. Neither in Mahomedan nor English Law is the heir of a living man recognised as having any rights of which he can be deprived, so as to make the transaction either illegal or immoral. It is, therefore, beyond the question to hold that the executing the kubala in this case is either illegal or fraudulent. A point is also taken by the learned Judge of the Court below, as to its being unjust to call upon the Court to fix arbitrarily the amount of purchase-money, when the sale was one comprising several properties, or one property upon which several rights of pre-emption could attach. The Court cannot see either the injustice or the difficulty in the case. Were it necessary for the adjudication of the present case, there would be no difficulty in the Court fixing what was payable in respect of each portion. The Mahomedan Law makes provision for such cases. The plaintiffs in the present case, in making their claim, offer to pay in respect of each claim such portion of the one lakh, the alleged consideration, as the Government revenue on each portion bears to that of the other ; or, in other words, to divide the lakh into so many shares bearing the relative proportion of the Government malgoozarees to each other. This could be easily ascertained if required.

There are also other points such as the intention of the parties. On this the Court has only to observe that, on special appeal, the Court has nothing to do with the reasons operating on the Judge's mind in finding particular facts. All the Court can do is to take the facts as found, and to decide whether the facts, as found, warrant the legal conclusion drawn. The present case resolves itself into this—Do the facts respecting this transaction, as found, amount in law to a sale ? The Judge below has found that this is not a sale to which the right of pre-emption attaches. On special appeal this Court finds that the Court of Appeal below was right. This Court finds that the transaction was not a sale, nor was it a hibba-bel-ewaz. According to Mahomedan Law a sale must be something in exchange for something else. Here, there is neither a money-consideration, nor anything in the place of a money-consideration ; in fact, it was a transfer without consideration, and therefore a gift. Technical and whimsical as the Mahomedan Law of Sales may appear on close examination, it will be found that the positive law draws its distinctions clearly, and gives reasons for so doing. The devices of the commentators, in order to get rid of the positive law, are ingenious, but, in the Court's opinion, ought not to be attended to. According to the authority of the Kefayeh, this is not a sale. The Court is not called on to say whether it is a gift or an ineffectual sale. It may or may not at a future day be ineffectual to pass the property as against the legal heirs. It is sufficient to say that it is not a sale on which the law of shuffa attaches.

On the subject of the cross-appeal, *viz.*, as to costs, it is not usual to interfere with a decision of the Court below as to costs, especially as costs are entirely in the discretion of the Court below ; but as the Court below has not given the successful party his costs, on the assumption that the successful party had caused the litigation by fraud, and as there is an error in this assumption, this Court amends that portion of the decree below, and gives the defendant her costs in all the cases.

The 26th May 1864.

Present :

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Endowment—Sale by Mutwalee.

Case No. 582 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 24th June 1861.

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Moonshee Golam Ali and others (Plaintiffs) *Appellants*,

versus

Mussamut Sowlutoonissa Bibee and others (Defendants) *Respondents*.

Messrs. R. T. Allan and *C. Gregory*, and *Baboo Debendro Narain Bose* for Appellants.

Baboos Unnoda Pershad Banerjee and *Roopnath Banerjee* for Respondents.

Suit laid at rupees 4,500.

In dealing with the Mutwullee of an endowment, it is not necessary for the purchaser to look farther than to the power of the Mutwullee under his deed of trust. If the deed gives the Mutwullee the power and discretion to make a sale, it is not a matter of concern to the purchaser whether that power or discretion is judiciously exercised or not.

Steer, J.—THE plaintiff, as the heir of the founder, sued Willaiut Ali, the Mutwullee or Superintendent of a wukf property, and others, in order to obtain his removal from his office on the ground of breach of trust, and in order to set aside certain alienations made by him of the trust property.

The Court which tried this suit originally decided that the Mutwullee had rendered himself liable to removal and removed him, but the alienations were upheld.

There were two appeals against this decision. Sudduroonissa, the widow of Willaiut Hossein, appealed against the order depriving the family of the office of Mutwullee.

Sowlutoonissa, one of the purchasers from Willaiut Hossein, appealed in the matter of her costs.

Besides these two appeals, there was a cross-appeal by Golam Ali in support of the order for the removal of the Mutwullee and in dissatisfaction of the order allowing the sales.

The appeal of Sudduroonissa was heard on the 26th November 1863 by another Bench of this Court, and the order of the Court of Original Jurisdiction was upheld in regard to the question of the Mutwullee's removal. In this appeal Sowlutoonissa was not made a respondent, so that the question of the validity or otherwise of the alienations made by the Mutwullee could not be argued.

In the meantime, however, Sowlutoonissa withdrew her appeal, and the effect of that act was that the plaintiff, who had relied on that provision of the law which enables a respondent to take any objection to the decision of the Lower Court which he might have taken if he had preferred a separate appeal from such decision, found that he had lost his opportunity of impeaching the judgment.

On this he applied to the Bench which struck off the appeal of Sowlutoonissa either to revive it, or to allow him time to file a separate appeal. For reasons stated in the order, the Judges, sitting as a Miscellaneous Bench, allowed him to file a separate appeal, and that is the appeal which we are now considering.

Mr. Allan for the respondent Sowlutoonissa raises a preliminary objection to the hearing of the appeal, to the effect that the order giving the appellant permission to appeal was one which the Judges were not competent to pass. It is in the power of a Judge or Judges of this Court to enlarge the time for appeal, and in this case the order only amounts to this. We, therefore, overrule this preliminary objection.

The only question in regard to the merits of the appeal is, whether the Mutwullee was authorized, by the terms of his appointment, to alienate portions of the trust property.

We have read the deed which constitutes this property wukf, and we have read the deed appointing Willaiut Hossein to the Mutwulleeship. We find in these an express power given to the Mutwullee to deal with the property in the same manner and under the same conditions as the parties creating the trust could do. One of these conditions was that, whenever it seemed advisable for the benefit of the trust property to sell a part in order to purchase other property, the Mutwullee might do it.

It is not alleged that the defendant has been guilty of any fraud, or that there is anything dishonest on his part in connection with the purchase. But it is argued before us that, in dealing with a trustee, the defendant was bound to enquire whether the sale of the land to him was made in order that other land might be purchased and substituted in the place of the land disposed of.

We do not think that there was any necessity for the defendant to look farther than to the power of the Mutwullee under the deed of trust. It was in his power and discretion to make a sale, and whether that power or discretion were judiciously exercised or not, was not a matter of concern to the purchaser. He saw that the Mutwullee had the power to dispose of the wukf property. He had the power, therefore, to create a title, and provided the defendant purchased

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in good faith and for fair consideration, nothing else was wanting to the validity of his purchase.

We, accordingly, affirm the judgment of the Lower Court, and dismiss the appeal with costs.

The 27th May 1864.

Present:

The Hon'ble W. Morgan and Shumboonauth Pundit, *Judges.*

Julkur rights — Evidence of title— Jurisdiction (of Civil Courts)—Possessory suits.

Case No. 495 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, dated the 7th July 1863.

Mr. J. G. Bagram (Plaintiff) *Appellant,*

versus

The Collector of Bhulloa and others (Defendants) *Respondents.*

Messrs. G. C. Paul and *C.* and *G. Gregory* for Appellant.

Baboo Kishen Kishore Ghose for Respondents.

Cases Nos. 376, 377, 379, and 380 of 1861.

Regular Appeals from a decision passed by the Judge of Rungpore, dated the 30th July 1861.

The Collector of Rungpore (Defendant) *Appellant,*

versus

Ramjadub Sein and others (Plaintiffs) *Respondents.*

Baboo Juggodanund Mookerjee for Appellant.

Mr. G. C. Paul, Moonshee Ameer Ali, and *Baboo Sreenath Doss* for Respondents.

Where the exclusive julkur right in a navigable river is set up against the ordinary rights of the State and the community, it must be established by clear and strong proof.

Evidence of possession and enjoyment for a series of years is of itself, if unanswered, cogent evidence of title.

Possessory suits are maintainable in the Civil Courts where no forcible dispossession is alleged.

Morgan, J.—In all these cases the plaintiffs claim exclusive rights of fishery in certain navigable rivers, and the cause of suit in each case is that the plaintiff has been unlawfully *dispossessed* by the officers of Government of his julkur rights ; in other words that he has been disturbed in the exercise of those rights, and deprived of the profits arising from them.

It is settled that the beds or channels of navigable rivers are ordinarily the property of the Government. Subject to the right of navigation and such other rights as the public have to the use of navigable rivers, those rivers and the soil over which they flow belong to the State. (Doe dem. Seebkristo *vs.* E. I. Company, 6 Moore's Indian Appeals, 267; S.D.R., 1859, p. 1357; Regulation XIII of 1825.) The general rights of the Government and of the public in the rivers where the plaintiffs claim their respective rights of fishery (in some of which rivers the tide ebbs and flows, in others not) are in no way brought in question in any of these suits. The julkur right alone is claimed. This right may, it seems, exist as private property. What was once common to all, or was the property of the State, may become the exclusive property of individuals. But when such an exclusive right is set up against the ordinary rights of the State and the community, it requires to be established by clear and strong proof. In one of the cases to which we have referred (S. D. R., 1859, p. 1357) it is laid down that the evidence to prove such a right must be of the very strongest nature.

In the first of these appeals (No. 495 of 1863), the julkur mehal in several navigable tidal rivers is claimed by the plaintiff in the suit as having been included in the Government settlement of his zemindaree, and as having always been in his possession. The settlement papers contain no mention of any such right, and the principal, if not the only documentary, evidence adduced in support of it, is a paper brought from the Collector's office, of old date, and purporting to relate to a private partition of the estate, in which a small sum is set down among the collections of the year 1186, as received for julkur of bheels and rivers. A decree in a suit is also in evidence wherein a neighbouring proprietor attempted unsuccessfully to assert a julkur right in one of these rivers against the plaintiff who resisted it. This evidence, both as regards its weight and (if we are strictly to apply English rules of evidence) the admissibility of part of it, falls very far short of the high standard of proof required to establish the plaintiff's right; but we shall not be giving undue weight to these documents, if we conclude from them and from the oral evidence of the fishermen who depose to having exercised their calling in these rivers for very many years on payment

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of rent to the zemindars, that the plaintiff has shown, at least until his evidence is answered and rebutted or explained, some *primâ facie* right to the fishery. The plaintiff's undisturbed possession of the julkur prior to the year 1860, when the Collector made a settlement of the julkur mehal with a farmer, was not, we are satisfied, disputed at the hearing of the suit; and his previous possession in 1842 appears from the proceedings for the assessment of this julkur, which were then commenced and afterwards relinquished.

In 1860 the Collector having notified the intention of Government to make a settlement of the julkur mehal, the plaintiff produced evidence in support of his claim thereto. After investigation the Collector, and the Commissioner on appeal, disallowed the claim; and a temporary settlement having been concluded with a third person, the plaintiff instituted this suit to question the validity of the proceedings by which he had been dispossessed. We are not informed of the law which the Collector professed to put in force. The Regulations under which the Government assesses revenue on land unlawfully held exempt from assessment, appear to be inapplicable to the present case. Even assuming that those Regulations apply to this description of property, their provisions do not authorize the measures adopted by the Collector. They provide for the assessment of property which is not legally exempt from assessment, and for the resumption of property belonging to the State, which is occupied by a person who has not a *bonâ fide* possession thereof; but they contain nothing to authorize a Collector, in disregard of a long continued possession founded on some color of right, to deal with property so possessed as if it were the undoubted property of the State and free from all private rights of ownership. We are of opinion that the proceedings of the Collector were not warranted by law, and that the plaintiff is entitled to be restored to the property from which he was dispossessed.

It was objected on behalf of the Government that this was a suit which could not be maintained, because the plaintiff proved no title to the subject matter of the suit, but relied only on his possession; and that possessory suits were not maintainable in the Civil Courts in India. The case cited (S. D. R., 1851, p. 295) decided no more than this—that a plaintiff who sues to recover property and relies on a possession ascertained and declared by an order of a Magistrate made in a proceeding under Act IV of 1840, cannot maintain a suit on this bare possessory title against a purchaser who holds the land by virtue of a *primâ facie* title of full property acquired by sale of a putnee mehal for arrears of rent. The sale necessarily affects the whole previous right and title, and in a suit to question its validity, the persons having the title must be among the litigants. This was the point decided; but the Court also expressed a doubt as to the general competency of the Civil Courts "to receive any regular suits which do not put in issue the whole merits of a claim or the absolute right and title of a plaintiff;" this doubt being founded on the fact "that a separate jurisdiction has been provided by law to which the exclusive adjudication of matters of mere possession and dispossession has been assigned." The Court, expressing this doubt concerning a matter not then calling for decision, did not, perhaps, sufficiently advert to the laws which created this separate jurisdiction.

The series of laws from Regulation XLIX of 1793 to Act IV of 1840 (then in force), which prescribed a summary enquiry into cases of disputed possession, had for their object the preservation of the public peace, not the adjudication of any Civil right. The title of Act IV of 1840 plainly indicates its object. It is "an Act for preventing affrays concerning the possession of land, and for providing relief in cases of forcible dispossession." Where force is used or is apprehended, the Magistrate interferes to keep the peace, and to maintain or restore the possession of him who held possession before the dispute commenced. Incidentally, he has also necessarily to determine which of the disputants, in fact, so held possession; but in doing this, he determines no Civil right either of property or possession. All such questions are left for determination by "a competent Court," that is, the Civil Court. The jurisdiction of the Magistrate in matters of possession arises only where there is violence or breach of the peace, actual or apprehended. The object of the old law was the same. In a note to Harington's Analysis, Vol. I., p. 86, there is given an order of the Court of Sudder Dewanny to the Zillah Judges, who then had this summary jurisdiction, directing them to abstain from the exercise of it where there was no *forcible* dispossession, and to leave the disputants to their remedy by regular suit. There is nothing apparently in these laws to exclude the jurisdiction of the Civil Courts in "matters of

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mere possession and dispossession." But whether the *dictum* in the case cited be correct or not, it seems to have but little application to any of the present cases, in each of which the suit is in form not a possessory suit confined to the investigation of possession and right of possession, but a suit based upon an alleged title to the julkur in respect of which title the plaintiff seeks to recover possession. In at least one of the plaints a *forcible* dispossession is indeed alleged, which, if true in fact, would have given the Magistrate jurisdiction ; but it is not disputed that the suit involves merely a question whether the julkur belongs to the plaintiff or to the Government, in which no force being used or apprehended, the interference of the Magistrate is not required, and which must, therefore, be decided by the Civil Courts.

The evidence in support of the alleged title in the first case we have already noticed. It amounts to little more than evidence of possession and enjoyment for a series of years, which, however, is of itself, if unanswered, cogent evidence of title. The plaintiff having thus alleged a title, and having adduced some proof in support of it, we have, on the other side, no evidence offered. The proceedings of the Collector afford no legal defence. If, as was suggested on behalf of the Government, the julkur rights in all navigable rivers in India are State property belonging, like waste lands, &c., to, and at the disposal of, the Government, we should be furnished with some authority or proof of this. The decision of the Sudder Court in 1859, which was relied on, treats such fisheries as public property in the sense of being open to the whole community. The Regulation XI of 1825 was referred to ; but we do not think it can fairly be inferred from the Regulation that the Government has this right generally in navigable rivers, because the julkur right in shallow streams has been recognised in some cases as the property of individuals. Admitting that, in this case, the river and its bed are State property subject to certain rights in the public, we must give effect to such evidence as has been adduced to establish plaintiff's exclusive right. Whatever may be the result of a full investigation of the plaintiff's claim, we hold that, in the present suit, he has shewn sufficient proof of such *primâ facie* right in himself as to enable him to maintain the suit to recover the possession of that from which he has been unlawfully dispossessed. We shall reverse the judgment of the Principal Sudder Ameen, and give a decree for the appellant (the plaintiff) with costs.

The appeal No. 376 of 1861 comes before us in review. The Zillah Judge had by his decision declared the plaintiff entitled to recover the possession of the julkur from which he had been illegally dispossessed by the Collector. In appeal the Court (Mr. Justice Bayley and Mr. Justice Roberts) approved of the Judge's finding, but held on other grounds that the suit must be remanded. An application for a review of this judgment having been granted by Mr. Justice Bayley, the case has, in his absence, been heard by us. We think that the decree of the Court below is correct for the reasons given by the Court, and that it must be affirmed with costs. The plaintiff having established to the satisfaction of both Courts sufficient to entitle him to a decree, in which conclusion we concur, it does not appear to us to be necessary to remand the case in order to ascertain if the period of limitation to all suits by the Government has been completed, which was the principal ground of remand. The respondent (the plaintiff in the suit) when he has again obtained possession of the fishery, may or may not be able successfully to rely on the Law of Limitation as a bar to all suits by the Government. However this may be, it is, to use the language of the Court in the decision which was referred to (2 Select Reports, 156) "obviously unjust that he should suffer any disadvantage from his having been informally dispossessed instead of having been regularly sued."

It is admitted that the other appeals, Nos. 377, 379, and 380 of 1861, are governed by the decision in the last appeal No. 376 of 1861.

The 27th May 1864.

Present :

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Res Judicata.

Case No. 2430 of 1863.

Special Appeal from a decision passed by the Judge of the 24-*Pergunnahs, dated the* 31*st July* 1863, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the* 18*th September* 1862.

Punchanun Roy (Plaintiff) *Appellant,*

versus

Modoosoodun Roy (Defendant) *Respondent.*

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Baboos Mutty Lall Mookerjee for Appellant.

Baboos Bhuggobutty Churn Ghose and *Grish Chunder Ghose* for Respondent.

A and his brothers made consignments of indigo to *B*, who sued *A* for the balance of an account due to him in respect of advances made by him to *A* and his brothers, and that suit was dismissed on the ground that no balance was proved to be due. *A* now sues to recover the proceeds of the indigo or his share of such proceeds. HELD that the dismissal of the former suit was not a bar to the institution of the present suit.

Morgan, J.—WE think that the Judge's order of remand in this case is correct. The defence relied on was that the matter had already been adjudicated in a former suit between these parties. In that suit the present defendant was the plaintiff, and he sued to recover the balance of an account. The transactions out of which the account arose were these. The present plaintiff (the defendant in that suit) had with his brothers made consignments of indigo to the plaintiff in that suit for sale; and the plaintiff in that suit alleged that he had made various advances to the present plaintiff and his brothers, and that on the whole transactions a balance was due to him in respect of those advances for which he sued. That suit was ultimately dismissed. The Court thought that the plaintiff had failed to prove any balance due, and the judgment of the Court seems to proceed on this that he failed to prove any advance made to the present plaintiff or on his account, or for which he could be held liable.

This suit is brought by the plaintiff to recover the proceeds of the indigo or his share of such proceeds. The dismissal of the former suit on the ground that no balance was proved to be due, is not a bar to the institution of the present suit. The defendant in this suit, if he relies by way of answer on a plea of payment, is entitled to support such plea by any evidence in his power. But if he proposes at the hearing of the suit to prove payment by relying upon the advances which were the subject of discussion in the former suit, and regarding which an adjudication was made in that suit, it will be for the Court to consider whether that matter, which was adjudicated in the former suit, can again be discussed in the present suit. If he relies upon other evidence of payment, it will of course be competent to the Court to consider this fact. We uphold the order of remand, and dismiss this appeal with costs.

The 27th May 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Suit to recover possession (by one of several shareholders).

Case No. 2432 of 1863.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 16th June 1863 reversing a decision passed by the Moonsiff of that District, dated the 29th November 1862.

Urjoon Sahoo (Defendant) *Appellant,*

versus

Baboo Bishen Dyal Sing and others (Plaintiffs) *Respondents.*

Messrs. A. F Lingham and *G. Gregory* for Appellant.

No one for Respondents.

In a suit by one of several shareholders to recover possession of land in the wrongful possession of the defendant, the defendant, though in wrongful possession, may object to the decree extending beyond the plaintiff's share.

Morgan, J.—WE must remand this case in order that the error which the Judge notices in the decree of the Moonsiff, but which he considers an error not affecting the merits, may be corrected.

The plaintiff is one of several shareholders, and he alone sues the defendant whom he alleges to be in wrongful possession of the land in dispute. The suit has been decreed in his favor, but the decree has awarded to him, not merely his own share in the land, but the shares of his co-sharers. The Lower Court is of opinion that the defendant being in wrongful possession of the land, it was not open to him to take this objection, whatever the co-sharers might have done. But this view is incorrect. The plaintiff being entitled to a decree against the defendant only to the extent of his own rights, the decree, in its present shape, if allowed to stand, might prejudice or affect the rights of the co-sharers. The case must be remanded to the Lower Appellate Court in order that the error may be corrected, and the decree confined to the plaintiff's share, which share must be accurately specified.

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The 30th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Mesne Profits—Costs of Receiver—Execution—Suit.

Case No. 2382 of 1863.

Special Appeal from a decision passed by the Additional Judge of Sarun, dated the 15th May 1863, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 10th April 1862.

Kazee Mahomed Ibrahim and others (Plaintiffs) *Appellants,*

versus

Lallah Jussodalal and others (Defendants) *Respondents.*

Mr. John Baptist for Appellants.

Baboo Sreenath Doss for Respondents.

Where, during the pendency of a former suit, the property in dispute was attached and a Receiver appointed at the instance of the defendant who was ultimately unsuccessful, and mesne profits were awarded to the plaintiff; and in execution of the decree, a deduction was made for the expenses of the Receiver,—HELD that a separate action would not lie for the recovery of that deduction, but that the plaintiff should have objected to the deduction in the Execution Department.

Levinge, J.—THE question raised before us is that there has been a misapplication of Construction 1129. The facts of this case are as follows:—There was a suit for reversal of an order for a sale of property declared liable to sale under a decree, and this suit was decreed in plaintiff's favor. During the pendency of the suit a Receiver was appointed, and the property attached, at the instance of the defendant, who was unsuccessful. In execution of the decree, which awarded to the plaintiff *mesne profits*, deduction was made from the amount calculated in favor of the plaintiff for the expenses of the Receiver caring and managing the property. The special appellant subsequently brought the present suit to recover from the defendant the expenses of the Receiver, alleging it was wrong to disallow him those expenses out of the *mesne profits* awarded him in the previous suit. Both Courts have dismissed the plaintiff's suit, holding that a distinct action would not lie for the deduction; and that if the plaintiff had felt himself aggrieved, he could have urged the objection in the Execution Department, and that it was a matter clearly involved in the decree of the former suit. We are of opinion that this case does not come within the Construction above referred to, inasmuch as this very matter was involved in the calculation as to the amount of the *mense profits* the plaintiff was to receive, it being clear that all proper expenses should be deducted before the profit could be arrived at. Special appeal dismissed with costs.

The 30th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Pleadings—Judgment—Limitation—Merits.

Case No. 2425 of 1863.

Special Appeal from a decision passed by the Judge of Sarun, dated the 16th May 1863, affirming a decision of the Principal Sudder Ameen of that District, dated the 31st May 1862.

Maharajah Rajender Kishore Sing Bahadoor (Plaintiff) *Appellant,*

versus

Roy Goodhur Sahary (Defendant) *Respondent.*

Baboo Kally Kishen Sein for Appellant.

No one for Respondent.

A decision on the plea of limitation in bar is not necessary where the decision on the merits is clearly and wholly against the plaintiff.

Levinge, J.—WE must remand this case to the Judge, with directions to him to hear the appeal and pass a legal finding on the issues raised. He must decide on the evidence whether the plaintiff has a case or not, and give his reasons for his decision, in order that the Court may see whether he has found for, or against, the plaintiff on legal evidence, as the Judge appears to have dismissed the plaintiff's appeal upon grounds wholly insufficient, as will appear from his judgment given here *in extenso.* The *first* ground of special appeal is "that the Judge's decision is "quite irrevelant and unintelligible, and the "reason assigned by him is not good in law." The *second* ground is "that the plea of "limitation was pleaded both in respect of "the general law, as well as of the special "law under Act XIII of 1848; but the "Judge's decision is so vague and indefinite "that it does not appear to which of the "two his opinion on the plea relates." And the *third* and last ground is "that the

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"Judge's order confirming the decision of the "first Court upon the merits, without stat-"ing any reasons, is quite unjust and ille-"gal."

We regret to say that there is good ground for upholding the first and third grounds of special appeal. The Principal Sudder Ameen laid down and tried an issue of fact, which was agreed to between the parties, *viz.*, was the land in suit, agreeably to the thakbust map, situate in the mouza belonging to the plaintiff, or in the defendant's mouza? and what is the intermediate boundary?

The Principal Sudder Ameen went into the evidence; and inasmuch as he was prepared to decide the suit on the above issue of fact and upon the merits, he preferred passing no decision on the issues raised in bar on the plea of limitation, and on consideration, and for apparently good and sufficient reasons, he dismissed the plaintiff's suit, holding that on the merits he has failed to prove his case. Against this decision the appeal was taken, and the Judge, Mr. Brodhurst, has passed the following remarkable judgment, the subject of the special appeal:—

"This suit was dismissed by the Lower Court on consideration of the facts of the case, and the appeal has reference only to these facts. I find, however, from the record that the first issue was one in bar, and that this was one undetermined by the Principal Sudder Ameen, because he considered it unnecessary. But the trial *of that issue was surely necessary*, because if the suit was found to be barred by the Statute of Limitation, there would have been no occasion to proceed further. The Court is not, however, in a position *to try even that issue*, for the plaintiff, appellant, has *neglected altogether* to file any documents, and, therefore, his suit *should have been* dismissed on that account at once. The order dismissing the suit is affirmed, and the appeal is dismissed with costs and interest,"—and thus ends the judgment.

Any person reading the decision would suppose that the Judge would have passed some decree on the plea of limitation, as he alleges it was surely necessary to decide the issue in bar, but he neither passes any decree or finding on that issue, or on the issue on the facts, but he suddenly terminates his judgment by stating that the Court is not in a position to decide on the issue in bar, because the plaintiff has filed no documents, and accordingly, for that reason, he dismisses the suit.

We have to observe that this reason appears to afford no ground for dismissing the plaintiff's suit in appeal. In the first place it does not appear from Mr. Brodhurst's judgment that the plaintiff had any documents to file; and further, it does not appear that he had any to offer in evidence that he should have filed with his plaint. If he had, it was discretionary with the Principal Sudder Ameen, being the Court of first instance, to have received or rejected those documents tendered on the trial. In short, the Judge has passed no legal judgment, and is bound to pass one that is relevant to the issues raised before him, or give better reasons than he has done, and on some substantial ground, for dismissing the appeal. He must uphold or reverse the decision of the first Court on the facts; or if he had liked, he might have passed an intelligible decree on the plea as to the Law of Limitation, if he found on the evidence that the provisions of that law were applicable to, and presented a bar to the plaintiff's right to recover in this action; but he is not to omit to do one or other, and to decide the appeal upon what appear to be wholly capricious and illegal grounds. We may observe that he is altogether wrong in saying that the Principal Sudder Ameen was bound to find on the plea of the law of limitation. The result of his own judgment shows it was not necessary so to do, and the Judge does not appear to be aware that, in order to apply the facts to the Law of Limitation, the facts must be first ascertained; and in the case before the Court, the facts being clearly against the plaintiff, taking the Principal Sudder Ameen's finding on them to be true, that officer was quite right in deciding the case on its merits, without making any finding on the pleas of limitation. They became, as a defence, wholly superfluous and unnecessary for the defendant's protection, once the merits were found to be wholly on his side.

The plaintiff having raised certain questions to be decided, and both parties being at direct issue as to whether the land in the suit mentioned is situate in the plaintiff's or the defendant's mouzah, the Judge was bound to entertain that question in this case and to decide the issue of fact; and if he shall, on that investigation and trial, come to the same conclusion as the Principal Sudder Ameen, he can dismiss the appeal on the merits, recording his opinion for so doing, and is not bound to make any finding on the plea of limitation in favor of the defendant, unless it shall become

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necessary on a finding that the facts are against the defendant. Case remanded.

The 30th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Examination of witnesses—Special Appeal.

Case No. 2380 of 1863.

Special Appeal from a decision passed by the Judge of Sarun. dated the 20th May 1863, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the 18th June* 1862.

Ram Dhun Singh (Plaintiff) *Appellant,*

versus

Rung Lal Singh and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Greesh Chunder Ghose* for Appellant.

Baboos Onookool Chunder Mookerjee and *Kalee Prosunno Dutt* for Respondents.

It is not imperative on a Lower Appellate Court to examine any number of witnesses a suitor may ask to have examined, and the refusal of the Court to do so is not a ground for special appeal.

Steer, J.—THE Court below heard 70 witnesses as to a matter of fact. After the trial in appeal had been completed, the special appellant applied to the Judge to summon 40 other witnesses. This the Judge refused to do at the stage the application was made. This is no ground for special appeal, as there was no error in law in the Judge's proceedings. It is not imperative on the Appellate Court to examine any number of witnesses a suitor may ask to have examined.

The special appeal is accordingly dismissed with costs.

The 30th May 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble G. Loch, *Judge.*

Ghatwalee lands (Kurruckpore)—Sale of.

Case No. 399 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 23rd May 1863.

Rajah Leelanund Singh (Plaintiff) *Appellant,*

versus

Doorgabutty and others (Defendants) *Respondents.*

Baboos Dwarkanath Mitter and *Unnoda Pershad Banerjee* for Appellant.

Baboo Debendro Narain Bose for Respondents.

Suit laid at rupees 10,000.

The lands of the ghatwals of Kurruckpore are not capable of alienation by private sale or otherwise, nor liable to sale in execution of decrees, except with the consent of the zemindar and his approval of the purchaser as a substitute for the outgoing ghatwal.

Loch, J.—THE property in dispute is a ghatwalee tenure in Mouzah Budheas, Pergunnah Shuhurdee, within the Muhalat Kurruckpore, a zemindaree belonging to the plaintiff.

The ghatwalee tenure has been sold in execution of a decree against the ghatwal Doorbejoy Singh, and it is contended by the plaintiff that such a tenure is not liable to sale without the consent of the zemindar; and, secondly, that, when the sale took place, the judgment-debtor was no longer ghatwal, as the plaintiff in his capacity of zemindar had removed him from office, he being unfit from age to perform his duties, and had appointed in his place his son Bhowaney on 8th May 1861.

The sale took place on the 20th of January 1862; but, as the tenure was attached on 28th September 1858, and again on 6th October 1860, the removal of the old Ghatwal and the substitution of his son would be no bar to the sale if such tenures are liable to sale in execution of decrees.

Looking, however, at the nature of the ghatwalee tenure in the Muhalat Kurruckpore, we think that the lands of the ghatwals are not capable of alienation by private sale or otherwise, nor liable to sale in execution of decrees, except with the consent of the zemindar and his approval of the purchaser as a substitute of the outgoing ghatwal. We think that the principle upon which the case of Kartick Chunder Dey *versus* Bhugut Bhurut Chunder Singh, S. D. A. Rep. 1853, page 900, relating to the Beerbhoom ghatwals was decided, applies to that now before the Court. These tenures are of very ancient date. They consist of lands given by the zemindar for service rendered by the ghatwals in preserving the peace, protecting the highways, apprehending robbers and other criminals,

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and for the performance of other duties. The ghatwals are appointed by the zemindar subject to the approval of Government; and, as the zemindar is responsible that proper persons hold these appointments, it is evident that no person can be introduced by the operation of an execution of a decree as holder of this kind of tenure without the approval and sanction of the zemindar. Had the zemindar no such veto, it is manifest that persons, unfit for the performance of the duties required by the office, or of questionable, nay of bad character, might purchase the right and interest of the incumbent and hold possession; and thus defeat the objects for which this kind of rural Police was created. The right of succession to the office of ghatwal is probably by custom hereditary subject to the approval of the heir by the zemindar. Compare Mussamut Teetoo Koonwary *versus* Surwan Singh S. D. A. Rep. 1853, page 765, Hurlall Singh *versus* Jorawun Singh, 6 Select Reports, 169-171, and we, therefore, think that the nomination of Bhowaney as ghatwal was, under the circumstances, legal and within the power of the zemindar. Possibly, the decree-holder may be entitled to have the decree satisfied out of the profits of the ghatwalee tenure in the possession of Bhowaney as heir of Doorbejoy. *See* Sartick Chunder Dey, Petitioner, 27th November 1848, 2 Sevestre's Cases, page 423; but on that point which depends on the question whether it is a new estate or not, we need not express any opinion at present. We think, therefore, that the sale must be set aside, and the order of the Lower Court reversed, and the plaintiff get a decree for possession, with all costs of suit, with interest thereon from date of decision.

The 31st May 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Sale by Hindoo Widow—Suit by Reversioner.

Case No. 2777 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 16th July 1863, reversing a decision passed by the Officiating Moonsiff of Begumgunge, dated the 29th December 1860.

Goluck Chunder Doss (one of the Defendants) *Appellant,*

versus

Gopal Kishen Sein and others (Plaintiffs) and others (Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Sreenath Banerjee and *Gopal Kishen Sein* for Respondents.

In a suit by a reversioner to set aside a sale of property made by a Hindoo widow, the Court cannot direct possession to be given to the reversioner, but can only declare the sale to be invalid and leave the widow, or her vendees as her tenants, in possession.

Loch, J.—THIS was a suit brought by certain reversioners to set aside a sale of property made by Bhoobunessury, a Hindoo widow, and by Soolochona, the mother of the deceased Shib Chunder, who, under a private arrangement with the widow, held possession of half the property of the deceased. The Lower Appellate Court has set aside the sales declaring them both unproved and invalid, and directed possession to be given to the reversioner, who will make over the profits to the widow.

An appeal is preferred on the ground that the Principal Sudder Ameen should have contented himself with declaring the sales invalid; that he had no right to oust the widow, particularly as the plaintiffs are not the nearest in succession, but Soolochona, the mother of the deceased Shib Chunder.

We think that the order of the Lower Court awarding possession to the plaintiffs was wrong. The Court should have been satisfied with declaring the sales to be invalid, and left the widow or the defendants as her tenants in possession. Indeed, it is questionable whether, during the life-time of Soolochona, the plaintiffs had any right to bring this action against the widow. As, however, this question is not before the Court, we need not give any opinion upon it. On the death of the widow, the present occupancy of the defendants on her part will be no bar to their taking possession if they are at the time the next reversioners. We, therefore, decree the appeal with costs, reversing that part of the decision of the Lower Court which gives possession to the plaintiffs.

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The 31st May 1864.

Present:

The Hon'ble W. Morgan and Shumboonauth Pundit, *Judges.*

Breach of contract (to cultivate Indigo)—Damages (Mode of estimating.)

Case No. 1541 of 1863.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 27th December 1863, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the 15th August* 1862.

Mussamut Zeenuttunnissa and others (Defendants) *Appellants,*

versus

Mr. C. Tombs (Plaintiff) *Respondent.*

Mr. A. F. Lingham and *Baboo Kally Kishen Sein* for Appellants.

Mr. R. T. Allan for Respondent.

In estimating the measure of damages to be paid for breach of contract to cultivate indigo, the period of the breach should be taken as the time for estimating the damages. Generally, the natural and immediate consequence of the breach of contract should alone be looked to, and not some possible remote result. Supposed profits ought not to be given as part of the damages, unless under special and extraordinary circumstances.

Morgan, J.—Both Courts have erred in the measure of damages to be paid by the defendant for the breach of contract to cultivate his land with indigo to be delivered to the plaintiff.

The estimated outlay requisite for the cultivation (the measure of damages adopted by the Court of first instance) furnishes no criterion of the loss sustained by the refusal to cultivate. The price in Calcutta of the indigo, which it is assumed that the land, if cultivated, would have produced, is also an improper test.

We have postponed our decision for some months, in order that a copy of the contract might be furnished to us. This has not been done. In remanding the case for a new trial and assessment of damages, we can at present only give a general direction to the Court below that, if the Court is satisfied that there has been a breach of contract (by the defendant's refusal to prepare his land or to receive the seed), then the period of the breach should be taken as the time for estimating the damages. Generally, the natural and immediate consequence of the breach of contract should alone be looked to, and not some possible remote result. The consequence of the defendant's refusal to cultivate may, in the present case, have been only this that the plaintiff was obliged to make a new contract for cultivation with another person, or it may have been the loss of the season for cultivation. In the first case a small award of damages would suffice for any loss or inconvenience sustained by the plaintiff; in the latter, the loss might be considerable and such as could only be repaired by substantial damages; but even in this case supposed profits ought not to be given as part of the damages, unless under special and extraordinary circumstances.

Pundit, J.—The plaintiff in this case sued the special appellant for damages on account of breach of contract committed by the latter, by not cultivating certain quantities of land with the indigo plant in two several years. He claimed the value of the quantity of indigo which, according to an account prepared and filed by him, each beegah of land yielded in those years respectively. The Principal Sudder Ameen held that plaintiff was entitled to recover as damages only as much money as he had actually lost by the breach of contract committed by the special appellant. To ascertain this loss, he said the account produced by the plaintiff, a paper prepared for this case, was of no avail, and that the plaintiff should have proved his loss by shewing the account books of the factory. So far, perhaps, the officer was right: but in order to find out the amount due to the plaintiff, he ascertained the total of the lands set apart for indigo cultivation in the factory of the plaintiff, and the total sum laid out in these two years. He then calculated how much of this total of outlay fell to each beegah of the total quantity of land, andthen taking this rate per beegah to be the loss per beegah, he calculated the same for the quantities of land not cultivated by the defendant, and deducting from the total of this sum the value of the indigo seeds which

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plaintiff would have been obliged to give, if defendant had cultivated the lands, he awarded the remainder to the plaintiff as damages.

Against this decision both parties appealed to the Zillah Judge, who decreed the whole demand of the plaintiff. Against this decision special appellant, defendant, has appealed.

It is clear that the plaintiff, and therefore the Lower Appellate Court, as well as the first Court, have adopted wrong data for ascertaining the damages for loss alleged to have been suffered by the plaintiff, and both the Courts have taken it for granted that, because defendant did not cultivate, plaintiff has suffered a loss. It is, therefore, ordered that the case be remanded to the first Court to ascertain, by legal evidence, if plaintiff has actually, in consequence of the breach, suffered any loss, and then to ascertain the value and amount of this loss by the account books of the factory, leaving the special appellant to give counter-proof on both these points.

The 31st May 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Mahomedan Law—Dower—Limitation.

Case No. 321 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhagulpore, dated the 8th March 1862.

Mussamut Beebee Jumeela (Plaintiff) *Appellant*,

versus

Mussamut Mulleeka and Syud Mahomed Hossein (Defendants) *Respondents*.

The Advocate-General and *Baboos Aushootosh Dhur, Chunder Madhub Ghose, Juggodanund Mookerjee*, and *Dwarkanath Mitter* for Appellant.

Messrs. J. W. B. Money, R. V. Doyne, and *G. Gregory, Baboo Kishen Kishore Ghose, Moonshee Ameer Ali*, and *Moulvie Murhumut Hossein* for Respondents.

Where nothing is expressed at the time of marriage, whether the dower is to be exigible or deferred, it must, under the Mahomedan Law, be considered exigible, and, as such, demandable and recoverable from the husband at any period during coverture.

Limitation is not applicable to a suit for exigible dower, except in a case of dissolution of marriage by death or divorce.

Loch, J.—The plaintiff, as the widow of Syud Mahomed, who died on the 21st February 1854, sues to recover the amount of her dower, estimated at Rs. 16,25,000, from the defendants, of whom Mulleeka is alleged to be in possession of the property left by Syud Mahomed, and Mahomed Hossein has obtained a decree in the Court of the Principal Sudder Ameen of Monghyr, dated 16th February 1859, declaring him to be entitled to a 12 anna share of that estate.

The fact of the dower is admitted by the defendants, though they differ as to the amount. The defence set up by them resolves itself into the question whether the claim for dower is barred by limitation ; and, as we shall presently see, that depends on the prior question whether Jumeela was divorced or not, as alleged by the defendant.

It appears that the dower was granted verbally at the time of the marriage, and that nothing was then said as to its being exigible or deferred. By Mahomedan Law (*see* Macnaghten's Principles, Chapter VII, Dower, Section 22, page 59) it appears that, if it has not been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand. And it is contended that, under these circumstances, the plaintiff is out of Court, not having sued for the dower within 12 years from the date of her marriage, when this dower became due. By Mahomedan Law (*see* Macnaghten's Principles, Case 32, page 283) there is no period of limitation fixed for preferring a claim to dower or other debts. Dower stipulated to be paid promptly becomes due at the date of the marriage ; but if the husband did not, during his life-time, discharge that part stipulated to be paid promptly, it, as well as the part the payment of which is deferred, must be realized from the estate, the Legislature having by Regulation III of 1793 Section 14 prohibited the Courts from trying or determining the merits of any suit, if the cause of action should have arisen 12 years before any suit should have commenced on account of it.

The first question before us is whether a claim to dower payable promptly is barred, if not preferred within 12 years from the

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date of the marriage. The Sudder Court in the cases of Meer Nuzib Oollah *vs.* Mussámut Doordanah Khatoon, 1 Select Reports, page 103, and Noorunissa Begum *vs.* Nawab Syud Mohim Ally Khan, 1 Select Reports, page 40, had held that such dower was barred if not claimed within 12 years from the date of the marriage. But we think that these decisions must be taken to be overruled by the Privy Council in the case of Ameeroonissa *vs.* Mooradoonissa, 6 Moore's Indian Appeals, page 211. In page 229 their Lordships say :—" It is important to consider how inconvenient it would be if a married woman was obliged to bring an action against her husband upon such an instrument: it would be full of danger to the happiness of married life; and we think, upon the true construction of the settlement, she had a right of suit without a previous demand, and was not obliged to sue her husband immediately or in his life-time. Their Lordships are, therefore, of opinion that the Regulation does not apply as a bar to her claim, and that such defence entirely fails."

We find that there is nothing to distinguish the claim to dower under the deed in that case, from the ordinary cases of dower, moajil or prompt. While a different construction prevailed, we cannot but feel that it must have interfered with and altered the substantive Mahomedan Law regulating the relation of marriage, endangered the security of the property of wives, and imperilled the peace and comfort of Mahomedan families. And we sincerely rejoice that, on grounds apparently of public policy, the highest Court of Appeal, following the decision of the Sudder Court of the North-Western Provinces, in the case of Nawab Bahadoor Khan *vs.* Musst. Azeez Begum, North-Western Provinces Rep., 10th February 1845, page 180, has determined that the Regulation of Limitation, a mere law of procedure, could never have been intended to have such an effect.

It is contended that this decision is based upon the inconvenience and danger to the happiness of married life, were a wife obliged to sue her husband during the continuance of their marriage, and that such considerations do not apply to the present case, *first*, because the deceased, Syud Mahomed, divorced the plaintiff more than 12 years before this suit; and, *secondly*, if the divorce be not proved to the satisfaction of the Court, yet it is admitted by the plaintiff and proved by her own witnesses that the husband and wife continually quarrelled, and that they have never lived together since 1837. Syud Mahomed died in 1854, and consequently the parties were separated for 18 years before his death. No feelings of delicacy or danger to domestic felicity could, in her case, be a reason for not bringing her action at an earlier period.

We are disposed to accede to the argument of the defendant's pleader that, if the divorce took place as alleged, and the relation of marriage ceased to exist, the reason for postponing the suit relied on by the Privy Council would cease to exist, and the claim to dower must be enforced within 12 years from that time, or not at all. But, consistently with the principle of the decision of the Privy Council, we do not think that anything short of the actual dissolution of the marriage by death or divorce would place the wife in such a position, that she must either sue or lose her remedy. We think that, in any case short of divorce, the compelling her to sue or lose her remedy would be to drive her to do an act which would have a tendency to prevent the couple coming together again, and would, therefore, be contrary to public policy, and tend to perpetuate domestic unhappiness and dissensions.

We must, therefore, now examine the evidence to prove the divorce, which is said to have taken place about the year 1834. Witnesses have been produced by the defendant that, on a certain night some 20 years ago, Syud Mahomed, in consequence of a violent quarrel with Jumeela, irrevocably divorced her; that he then left the house which they had occupied together, and they had ever since been separated. It is further shown us that Jumeela was examined on the 16th February 1837 by order of the Magistrate, and she then stated to the serishtadar of the Magistrate's Court who was deputed to take her examination in the presence of her husband, that she would not return to him, for that about 3½ years previous he had divorced her and would kill her. Syud Mahomed was asked whether it was his wife who made the answers. He said it was her voice, but that she was prompted by some one. The parties never met after this.

On the other hand it is stated that, after the separation took place, Jumeela lived with her mother, who, being annoyed by Syud Mahomed's conduct in preventing food and water entering their house, presented a

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petition to the Magistrate in February 1837, praying that Syud Mahomed might be restrained. From a proceeding held by the Magistrate, dated the 18th February 1837, it appears that, on the receipt of this petition, summons was issued against Syud Mahomed, who filed a petition stating that he was the manager of his father-in-law's property, and that there had been no divorce, but that his mother-in-law prevented his wife joining him. On this the serishtadar was deputed to examine Jumeela to ascertain whether she was under restraint or was unwilling to join her husband; and it was at this examination, in the presence of the husband, that she declared that she had been divorced, and would not return to her husband. On receiving the serishtadar's report, the Magistrate bound down Syud Mahomed in rupees 300 to keep the peace. He appealed to the Judge, and from the proceeding of the Judge, dated 20th July 1837, it appears that Syud Mahomed prayed the Judge to send an order to the Joint Magistrate to enable him to take his wife. On 26th December 1838, he presented another petition, which the defendants in this case have declared to be a forgery, but which has been sufficiently proved by the evidence of the amlah of the Magistrate's Court, in which he distinctly states that there had been no divorce; that a reconciliation and co-habitation had taken place; and he prays that a mochulka might be taken from his mother-in-law, lest she should prevent his wife joining him, because she was offended at his not lending her Rs. 500. But it is urged that this petition is after all not material, for, on 25th August 1843, Syud Mahomed filed another petition which is not disputed, in which he stated that one Abdool Reza had been living in his father-in-law's house, and had persuaded his (Syud Mahomed's) mother-in-law and wife to accompany him to Mecca; that a wife could not go to Mecca without her husband, and if she went, his reputation would suffer; and he prayed that the Magistrate would take mochulka from his mother-in-law and one Zeenut-onnissa not to take his wife with them. Then, looking at the diary which Syud Mahomed used to keep, and which the opposite party have put in, though inadmissible as evidence in their favor, may be used by the plaintiff. The entries of the 5th March and 26th April 1846, among others, will explain his conduct. He then thought a suit, for dower was barred by lapse of time, and has clearly recorded his thoughts to that effect; but previous to 1846 he knew that he was liable to be sued, and so professed, more than once, that no divorce had taken place. Besides, the conduct of the parties now before the Court, since the death of Syud Mahomed, clearly indicates that no divorce had taken place, for no sooner was he dead than Jumeela claimed the right to administer to his estate. The heir-at-law defendant, Mahomed Hossein, admitted her claim to a 4 anna share as wife, and his present assertion that she was divorced is inconsistent with his previous statements; and though Mulleeka alleged that Jumeela had been divorced and set up a will said to have been executed by Syud Mahomed, that will was rejected as spurious, and the heir-at-law obtained a decree for 12 annas of the property left by Syud Mahomed.

On the other hand it is urged that the petition of the 26th December 1838, alleged to have been filed in the Magistrate's Court by Syud Mahomed, bears such external and internal evidence of forgery, that it cannot be admitted in support of the plaintiff's claim; that though the copy bears the signature of the then Magistrate of Bhaugulpore, Mr. Heywood, yet, in the absence of the original petition, which has been destroyed, and of the Register of Petitions of 1863, which has most unaccountably disappeared, while those of the previous and subsequent years are forthcoming, it is impossible to say, with any certainty, whether such a petition was really presented by Syud Mahomed, or whether the original, from which this copy is said to have been taken, was a genuine petition. Then, looking at the object of the petition, which was to take mochulka from his mother-in-law, because he would not lend her money, and he was afraid that she would not let his wife join him, the detail entered into by him of his quarrels with his wife, reconciliation, co-habitation, &c., appears out of place, and to have nothing to do with the object of the petition, and really looks as if the petition were an attempt at cooking evidence; that nothing is more common than attempts to get up evidence of a fact in this indirect manner by the presentation of petitions from time to time in various Courts, on which no action is taken, and which are intended to be infructuous till the necessity for their use arises; that the subsequent petition of 1843, as well as the proceedings before the Magistrate, show that it was not Jumeela's person that he wanted to get possession of, but the property which they were trying to keep

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from him ; that he applies the term wife to her, because that was a proper term to make use of in describing one who had been his wife.

After considering the evidence which has been laid before us, we think that the divorce is not proved for the following reasons. It is notorious that the husband and wife lived together on most unsatisfactory terms ; that their quarrels were frequent ; and that they separated some time in 1834 or 1835. Now, had there been a divorce, there was no course which an angry and ill-used woman was so likely to take, nor one better calculated to bring trouble upon the husband whom she hated, nor one more likely to be urged upon her by her friends, than to bring a suit for dower. If they knew that it was exigible dower, there was the more reason to commence the suit without delay. If it were deferred dower, the rupture of the marriage tie rendered the husband liable to the demand, and it is improbable that the wife would have remained quiet under the circumstances. It has been hinted that the means of the husband at that time were so small that it would not have been worth her while to have brought her action, and we find from the evidence of Mr. Collis that, in 1822 (1229), Syud Mahomed was dependant on his father who gave him an allowance of Rs. 50 a month. But, admitting that he was in straitened circumstances and dependant on his father to the date of his father's death, which, according to the diary written by Syud Mahomed and put in by the defendant, occurred on 8th of January 1848 (18th Pous 1255 F. and 30th Mohurrum 1264 Higree), yet such a reason was not likely to stop an angry woman from bringing her action, if with no other object than causing her husband annoyance ; but she must also have been aware that the property possessed by his father would, in all probability, descend to him, and then her dower would be operative against that property.

Again, had Jumeela been divorced, it appears very improbable that, on three subsequent occasions, Syud Mahomed should, in a public manner, have acknowledged her as his wife, *viz.* in February 1837, December 1838, and August 1843, and on the two former occasions should distinctly deny the divorce, and claim possession of her person as his wife. His object, it may be said, was to get possession of her person in order to exercise his spite upon her, or to obtain a control over some property which she possessed ; but whatever was his object, any words that he might have subsequently said, or any allegations he might have made before the authorities by petition, could never unmake a divorce which had become irrevocable under the Mahomedan Law. This, no doubt, is true, and were we prepared to admit the credibility of the witnesses adduced to prove the fact of the divorce, we should have no difficulty in putting aside their subsequent statements made by Syud Mahomed, and we admit that that evidence is strongly corroborated by the examination of Jumeela by the Magistrate's serishtadar on 16th February 1837, for in that she distinctly states that she was divorced three years previous ; and the account she gives of the occurrence tallies, in many respects, though in less detail, with the evidence of the witnesses. This examination was taken in 1837 ; that of the witnesses in 1861-62. Is it not probable that, with the statement of Jumeela in their hands, the defendants were able to and did, without difficulty, lay down the course of evidence that was to be brought forward in support of the allegation of divorce ?

Objection has been taken to the petition of Syud Mahomed bearing date the 26th December 1838 that it is surreptitious ; that there never was an original petition of that purport filed by him in the Magistrate's Court, and that it was filed without any cause, and that the detail given in the petition is inconsistent with the prayer and object of the petitioner. Here, too, we must acknowledge that the circumstances under which the copy has been procured are open to great suspicion. The Register of Petitions of 1838, in which it should have been entered, is not forthcoming, while those of the former and subsquent years have been produced. The original petition has been destroyed, so it is alleged by the amlah of the Magistrate's Court, under orders of the late Nizamut Adawlut, with other old records, and the copy first saw the light in 1854, immediately after the death of Syud Mahomed, when Jumeela put forward her claim to administer to the estate. Were this the only written statement in the case alleged to have been made by Syud Mahomed, we should, no doubt, under the above circumstances, hesitate to accept it ; but when we find that, both before and subsequent to the date of this petition, other written statements of a somewhat similar purport were made by him to the Magistrate (and it is not disputed that they were

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filed by him), we cannot reject this petition unless there be some internal evidence of its being spurious. Looking at the copy we find that it bears the signature of Mr. Heywood, who was Magistrate of Bhagulpore at the time when the copy was prepared. It bears the seal of the Magistrate, and purports to be a copy of a petition presented to the Magistrate in 1838. The seal and signature of the Magistrate cannot be disputed. That the copy came from the Magistrate's office, there can be no doubt; and the evidence of Sumbhoo Dutt, record keeper, and Kedarnath, writer of the Magistrate's office, proves that the copy was prepared from an original in the Magistrate's office. Then, as to its object. On referring to the Magistrate's proceeding of February 1837, it will be found to have been presented in furtherance of, and in compliance with, the order passed by that authority. In that proceeding, the Magistrate had referred him to arbitration about his wife. He appealed to the Judge, and the appeal was dismissed in July 1837. In December 1838, or 18 months after, he applies to the Magistrate; says he has settled with his wife that, in consideration of the dower which she is to receive after his death, she had agreed to return to him; but that a fresh difficulty had then started up, and which he sought the Magistrate's assistance to overcome, and that was his mother-in-law's opposition, provoked or aggravated as it was by his refusing to give her pecuniary aid. Whether the statements in the petition be true or false; whether he had, as he asserted, been reconciled to his wife; or whether it was merely a pretence to get hold of his wife in order that he might cut off her nose, as one witness deposes that he much desired to do, it was by no means an improbable course for him to follow, having the object in view, the securing of his wife's person; and that is really the chief object of the petition. Then, if we turn to his diary which has been put in by the defendants, and can therefore be made use of as evidence by the plaintiff, and look at the cogitations of his mind as recorded by himself in 1846, when he thought that an action for dower was barred by the Statute of Limitation, we find that he never asserts that he had divorced Jumeela; but says that, as she in 1837 had told the serishtadar that she had been divorced, he now accepts that declaration, and looks upon her as divorced; and as 12 years had elapsed since the alleged date of divorce, her claim of dower was no longer admissible, for which he thanks God, and wishes her anything but happiness. The entries of 5th March and 6th April 1846, and 2nd August 1847, are curious revelations of an ill-disciplined and malicious mind, calculating how a just demand may be foiled, and rejoicing at the means put into his power by the law to defeat the right of another whom he had ill-used.

We have, no doubt, a great difficulty in getting over the positive statements made by Jumeela in her examination by the Fouzdary serishtadar on 16th February 1837, that she had been divorced. Syud Mahomed was present at the time. Had he then said that she had been divorced, there would have been an end of the matter. He had the opportunity, but it did not serve his purpose then to say so. Instead of this he put certain questions to her with the apparent object of weakening the credibility of her statement in this respect. The statement, we think, can only be looked upon as the declaration of an ill-used woman, goaded to desperation by recent annoyance, and hating her husband most cordially for his ill-treatment of her. But such a statement from her is, after all, no legal divorce. She might have proclaimed it through the country, yet, if her husband had not pronounced the words of the irrevocable divorce, her declarations could not dissolve the marriage. Divorce, in such cases as the present, is the act of the husband only, and the wife's declaration is no evidence of the divorce, unless corroborated by other proof, such as the evidence of credible witnesses who heard the words pronounced. Looking, therefore, at the conduct of Syud Mahomed and the statements made by him, both in public and private, we consider the statement of Jumeela not to be conclusive proof of the divorce; nor do we think that the fact has been satisfactorily proved by the oral evidence. Further, we have the fact, which must not be omitted, that the defendant, Syud Mahomed Hossein, the heir-at-law, who brought his action to recover possession, and was successful, fully admitted Jumeela's right to a share in the property of Syud Mahomed as his widow. Had she been divorced, and the fact been spread abroad, as we are now called to believe, would he have regarded Jumeela at all? After a cause of litigation, in which he has admitted her title as wife of Syud Mahomed, he suddenly finds that she has been divorced.

We come now to the question already pressed upon our attention. It is urged that, if

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the Court, accepting the decision of the Privy Council in the case of Ameeroonissa, apply the principle there laid down to the present case, the circumstances of the two cases are not similar. The decision in Ameeroonissa's case ruled that, to preserve the peace of domestic life, it was inexpedient that the wife should be obliged to bring a suit against her husband for dower either immediately or during the life-time of the latter. But in the case before the Court, it was evident that Syud Mahomed and Jumeela had been living a cat and dog life for years, which ended in their separation, and they never lived together again. Why, then, if the dower were exigible, did Jumeela not bring her suit after the separation ? There was, in this case, no domestic felicity to be injured, for that was unknown to them ; and, under the circumstances of this case, it is evident that no thought of affection need or could have restrained the wife from bringing her action. The probable reason which withheld Jumeela from bringing her action at an earlier period will be given immediately. But with regard to the argument before us, it is sufficient to say that, if the ruling of the Privy Council goes to the extent of saying that exigible dower, though demandable at any time during coverture, need not be sued for during the life of the husband, and we believe this to be the opinion of that Court, then the present plaintiff would not be debarred from bringing her suit after her husband's death, though her domestic felicity had been destroyed by his ill-usage which led to their separation. Though, under such circumstances, the probable course which an injured party would take, would be to bring an action, yet if she failed, for reasons best known to herself, from doing so till after her husband's death, such delay could not deprive her of a right to which, under the decision above quoted, she is declared to be entitled. But the real reason which, we believe, caused the delay, was that all parties looked upon this as deferred and not exigible dower. The rule laid down in the Mahomedan Law is precise,—that if nothing be said at the time, the dower is to be considered exigible. Now, we have no satisfactory evidence that anything was said at the time of fixing the dower ; but the acts of all the parties go to prove that they thought it to be deferred. Had Jumeela believed it to be exigible, she and her friends would have lost no time in bringing her claim for it ; but not being divorced, she did not think it could be claimed till after her husband's death. Had Syud Mahomed thought that it was exigible and claimable only within 12 years from the consummation of the marriage, we should not have found him carefully calculating the time from the date of the divorce, and rejoicing that a lapse of time had deprived his wife of her remedy. Believing, as we do, that no divorce had taken place, the impression on the mind of Jumeela that the dower was deferred, an idea equally entertained by her husband, sufficiently accounts for the delay in bringing the suit. Though, therefore, by the Mahomedan Law, the absence of any words defining it, made the dower actually exigible, yet both parties, as shown by their conduct, considered it to be deferred ; and, therefore, Jumeela, though separated from and being in bad terms with her husband, did not sue, because she did not think the dower claimable till after his death.

Considering, therefore, that, as nothing was determined at the time of the marriage whether the dower were to be exigible or deferred, it must, under the Mahomedan Law, be considered exigible, and, as such, demandable and recoverable from the husband at any period during coverture, and also recoverable from him after divorce or from his estate after death, if the action to recover be brought within the period of limitation prescribed by law; and, as held by the Privy Council, that such claim, though due, need not be sued for immediately or during the life-time of the husband ; and, as the divorce pleaded by the defendant has not been proved, we think the plaintiff has brought her suit in time ; but as we have not evidence before us to determine satisfactorily the amount, we think that the Lower Court will be able to come to a satisfactory conclusion on this point. We reverse the decision of the Lower Court with costs, and remand the case to the Principal Sudder Ameen, to dispose of the question as regards the amount of dower.

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The 31st May 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Joint ancestral lands—Demolition of house built by one co-sharer—Criminal charge.

Case No. 2793 of 1863.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 4th June 1863, *affirming a decree of the Moonsiff of that District, dated the 4th September* 1862.

Brojonath Muzoomdar (Defendant) *Appellant,*

versus

Ram Komul Ghose and others (Plaintiffs) *Respondents.*

Messrs. R. T. Allan and *A. F. Lingham*, and *Baboo Bhoobun Mohun Roy* for Appellant.

Baboos Mohesh Chunder Chowdry and *Khetter Nath Mookerjee* for Respondents.

A sharer of joint ancestral lands is not barred from suing in the Civil Court for the demolition of a house built on the land by his co-sharer without his consent, merely because he had in the first instance lodged a complaint in the Criminal Court against the building of the house.

Glover, J.—SPECIAL respondent in this case (plaintiff in the Court below) sued for possession of a certain share (6 annas) of what he alleged to be his joint undivided ancestral lands; and for the demolition of a house which the special appellant had built upon it in spite of his (special respondent's) objections and remonstrances. The case was in the first instance brought in the Criminal Court, and the defendant (special appellant) then pleaded that he had purchased two out of three shares of the special respondent's ancestral property from the other co-sharers, and had built a house on the land of these shares which was regularly divided from that of the third or plaintiff's share. The Criminal authorities referred special respondent to a Civil action, and the present case was the result.

Both Lower Courts found that the property was joint and undivided, and that the house ought to be demolished. It is urged before us in special appeal, that, as the special respondent took no proper steps to prevent the building of the house when it was first commenced, he has no claim to have it demolished now that it is finished.

Special appellant has abandoned his ground of separate tenancy, and bases his objections solely on the point that, as special respondent neglected his own interests and allowed the house to be erected on his ijmalee lands, without taking any sufficient steps to protect his rights, he ought not, now that the house is finished, to be allowed to step in and demolish it. He refers to the precedent of the late Sudder Dewanny Adawlut, dated August 28th, 1856, Jankee Sing and others *versus* Bukhoree Sing and others, in which it was held that, although every co-proprietor has a right of veto to forbid anything being done to the common property without his consent, and can sue to restrain his co-sharers from erecting buildings, &c., on the common property, the suit must be brought when the injury is first commenced, otherwise his consent will be implied.

The special respondent was doubtless wrong in bringing his suit in the Criminal Court at all; still the fact of his doing so proves that he has from the first determined to prevent special appellant's building the house, and it cannot be said that he remained quiescent under what he supposed to be an infringement of his rights. The special appellant commenced building his house (we may take the dates as proved, for the special appellant does not deny them) on the 28th of Maugh 1268 B. S., and on the 3rd of Phalgoon following, the complaint was lodged before the Criminal authorities.

There was clearly no delay here nor indeed afterwards, for directly the special respondent was referred to the Civil Court, he instituted the present action (June 11th, 1862). The special appellant knew all along that his right was contested, and if, after the complaint in the Fouzdaree Court, he still chose to proceed with his building, he has only himself to blame when the Civil Court decrees its demolition.

We see no reason to interfere with the Principal Sudder Ameen's decision, and we dismiss the appeal with costs.

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The 1st June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Possession — Auction-purchaser — Plea of mourosee title — General rights as tenant.

Case No. 2825 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, dated the 1st August 1863, reversing a decision of the Moonsiff of that District, dated the 9th May 1863.

Ram Naffer Khara (Plaintiff) *Appellant,*

versus

Degumber Chatterjee and others (Defendants) *Respondents.*

Baboo Khetturnath Bose for Appellant.

Baboos Nubokissen Mookerjee and *Mohesh Chunder Bose* for Respondents.

In a suit to recover possession against an auction-purchaser at a sale in execution, where the plaintiff fails to prove his special plea of a mourosee title supported by a pottah, he cannot be allowed to fall back upon his general rights as a kudeemee ryot.

Glover, J.—SPECIAL respondent in this case (defendant in the Court below) was an auction-purchaser at a sale in execution of a decree, and ousted special appellant, a tenant on the estate, from possession of certain lands heretofore held by him. Special appellant pleaded that his title was a mourosee one, and filed a pottah in support of it. The Court of first instance held that the pottah was spurious, but that, as the special appellant was an old jotedar, he was entitled to recover possession of the land as an ordinary tenant. In appeal, the Principal Sudder Ameen concurred with the Moonsiff in his estimate of the pottah, but considered that that being thrown out, the plaintiff had no *locus standi*, and no right to recover possession.

It is argued before us that, granting the pottah to be spurious, the special appellant still retains his general rights as tenant, and cannot be ousted at the mere caprice of an auction-purchaser at an execution sale.

We see no reason to interfere with the Lower Court's order. Had the special appellant come into Court standing simply on his general rights as an old ryot, the special respondent might have been restrained from ousting him; but when he comes in on a special plea, and that plea a mourosee title supported by a pottah, he is clearly bound to prove that special plea, and if he fails, cannot be allowed to fall back upon his general rights. In the present case, the pottah has been found by both the Lower Courts to be a forgery, and the special appellant cannot now, as he wishes to do, ignore that document and stand on his right as a kudeemee ryot.

We, therefore, dismiss the appeal with costs.

The 1st June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Pre-emption (among Hindoos in Behar).

Case No. 2504 of 1863.

Special Appeal from a decision passed by the Judge of Sarun, dated the 8th June 1863, affirming a decision of the Principal Sudder Ameen of that District, dated the 3rd September 1862.

Mussamut Joy Koer and others (Defendants) *Appellants,*

versus

Suroop Narain Thakoor (Plaintiff) *Respondent.*

Baboo Roopnath Banerjee for Appellants.

Moulvie Murhumut Hossein for Respondent.

The custom of pre-emption has been recognized among Hindoos in the Province of Behar.

Steer, J.—THE property in respect to which the right of pre-emption is claimed in this suit is one called a brit. The plaintiff has become by a former purchase a joint owner of the brit, and the rest of it having been sold to the defendant's husband by the original owners, the plaintiff asserts his right to it under the Law of Pre-emption.

Both the Courts below have given the plaintiff a decree.

In special appeal it is contended that, before the right of pre-emption was declared in favor of the plaintiff, the Court below ought to have instituted a local enquiry to ascertain whether local custom recognizes in that part of the country a right of pre-emption between parties who are both of the Hindoo religion.

But the first Court gave judgment against the defendant without making any local enquiry. In the appeal to the Judge it was not made a ground of objection that no proper adjudication could be arrived at without an enquiry as to custom, and no such ground

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is urged in the written grounds of special appeal to this Court. Had the objection been more sound than it is, we should hardly have allowed such an objection, reserved, as it has been, to such a late stage; but the fact is, that it does not need a local enquiry to determine, whether, in the Province of Behar in which the land in suit is situated, the custom of pre-emption has been recognized among Hindoos, for it is a well known fact that it is recognized; nor is there anything peculiar in respect to the circumstances of this case which renders a local investigation essential, in order to enable the Court to judge whether there is anything in connection with the rights of the parties which would make the exercise of the right in this case either unreasonable or productive of inconvenience or injury to any of the parties.

In this view, we dismiss the special appeal with costs.

The 1st June 1864.

Present:

The Hon'ble W. Morgan and Shumboonauth Pundit, *Judges.*

Mortgage (Zur-i-peshgee).

Case No. 2548 of 1863.

Special Appeal from a decision passed by Moulvie Itrutt Hossein, Principal Sudder Ameen of Sarun, dated the 12th June 1863, modifying a decision of Syed Mahomed Fureedooddeen Khan, Sudder Ameen of that District, dated the 9th February 1863.

Hurreehur Singh (Defendant) *Appellant,*

versus

Dabee Sahoy (Plaintiff) *Respondent.*

Baboo Kally Kissen Sein for Appellant.

Baboo Mohesh Chunder Chowdry for Respondent.

A zur-i-peshgeedar is entitled to retain the whole property pledged to him until the whole debt has been paid to him. It is optional with him to relinquish any portion either on receiving a proportionate amount of what is due to him, or otherwise.

Pundit, J.—THE vendors of the plaintiff, proprietor of eight mouzahs, gave a zur-i-peshgee lease for Rs. 991 to three persons. Of this money one portion belonged to Chooba Singh, and the remainder in different portions to two other zur-i-peshgeedars. The said vendors of the plaintiff then sold three out of the eight villages to Chooba Singh, zur-i-peshgeedar, and his share of the zur-i-peshgee was thus paid off. The remaining five villages were also afterwards sold, and one of them was purchased by the plaintiff, and this action is brought by the plaintiff against the other two zur-i-peshgeedars to recover the possession of the village purchased by him. The Court of first instance deducted from the original amount of the zur-i-peshgee the amount belonging to Chooba Singh, who had been paid, and thus reduced the zur-i-peshgee to Rs. 594-2-2. As the zur-i-peshgee lease was silent regarding the respective separate liabilities of each of the villages leased out, the Court by an arbitrary calculation found the rateable share due from the village purchased by the plaintiff. The profits from this village were put down at Rs. 33, and on this basis the Court came to the conclusion that the proceeds of the village did not exceed the profits secured to the defendant, and so the debt due from the said village, found by this mode of calculation, was not paid off or any surplus collection made as claimed by the plaintiff. The Court therefore passed a decree in favor of the plaintiff on condition of his paying the sum of 314 rupees found as the share of the zur-i-peshgee due from the village of the plaintiff, and held that the remainder of the zur-i-peshgee was payable, according to the same calculation of rateable shares, by the purchasers of the other four villages. The plaintiff appealed against this decision, which was open to objection, we may notice, upon this ground, that it was a conditional decree for redemption. The Lower Appellate Court by its calculation put down Rs. 271-7-5 as the rateable sum due from the village purchased by the plaintiff, and deducting from it a $\frac{9}{16}$th share as representing the share of Chooba Singh, the zur-i-peshgeedar who had been paid, declared the remainder Rs. 182-0-4½ as the money payable from the said village. The Court then put down the yearly profits of the village purchased by the plaintiff at Rs. 28-8 and calculated by a process not clearly understood, that from the proceeds of the village from the year 1245 to 1268, the debt was paid off and a surplus of Rs. 426-8-8 had become due to the plaintiff. On these grounds the Court decreed to the plaintiff the immediate possession of the village and an award of Rs. 426-8 with interest upon the same from the date of the plaint, together with mesne profits of the property from the year 1269 up to the date of possession being restored.

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Against this decision the defendants appeal, and plead that the plaintiff should not be allowed to divide the joint debt and the joint liability.

It is clear that, as far as regards the money due to Chooba Singh, the defendants have already allowed a division to take place, and so far the division is unavoidable. The sum that was originally due to this zur-i-peshgeedar having been paid, it is either a fixed and ascertained one, or should now be fixed and determined. Respondent says the other four villages have been released by the defendants to the purchasers, but there is no finding in support of this allegation. Whether released or not released, it is clear that plaintiff has no right to divide against the wish of the defendants the debt jointly due from these five villages It is also clear that the arbitrary modes of calculation adopted by the Lower Courts respectively, are not fair and equitable proceedings. The purchasers of the other four villages are not parties to this suit; and if the liability of the plaintiff for one village is fixed in their absence as against them, this determination of liability will not be any legal data for calculating their liabilities for the four villages purchased by them. It will be fair and just to all parties to credit the defendants for the first year with the admitted or proved sum of zur-i-peshgee due from the five villages and any interest due to them on that account, and to debit them with the proceeds of the five villages for that year. If this reduces the original debt after payment of the interest, if any be due to the defendants, the balance with its interest, if any, is to be credited to the defendants for the next year, and the proceeds of the five villages to be debited again, and so on from year to year till the date of the plaint. Even if defendants have lost or given up possession of any or of the entire remaining four villages, the proceeds of all these four villages are to be debited to the defendants in order to settle the accounts of the plaintiff. If these four villages are also in the possession of the defendants, and the result of the enquiry, as given above, shows that a part of the zur-i-peshgee is still due, the defendants may, if they like, receive from the plaintiff the sum which may, according to the respective yearly income of the villages, represent the rateable share of the village purchased by him. and make over to him the same villages. If the defendants do not like this division, the plaintiff would be entitled to obtain possession of his purchased village for himself and of the other four for the other purchasers, on payment of the entire sum due to the two zur-i-peshgeedars regarding all the five villages. If these purchasers or some of them agree to pay their respective quota, these villages are to be released to them. The defendants will be called to give up at once all the five villages, but only on the entire sum due to them being paid. If these four villages or any number of them have been released to their purchasers, the persons to whom possession has been given need not then be made defendants, and defendants must be made to show what sum they have realized from them, if any, in cash or otherwise. In this case plaintiff will have to pay only a rateable sum for his village or for the villages remaining with the defendants, even if that be less than the amount due to the defendants after debiting them with the money paid to them by the purchasers of the other villages, and will, after payment, obtain possession of other villages besides his own for their purchasers. If, however, after debiting these payments, the sum due to the defendants be less than the rateable share of the village now in dispute, or, besides this village of other villages to be restored, plaintiff will be required to pay only that sum due, and no more. If defendants suffer any loss by this mode of calculation, they have to blame themselves and no other person, as they were not bound to make over the villages they may have given up. If, by account, it be discovered that defendants have realized more than their due, they will, besides giving possession, have to make over, according to the proportions of the collections of each village, rateable mesne profits up to the date of restoring possession of the villages to the plaintiff or to him and others who may appear to claim possession. The accounts of collections are to be given by the defendants as mortgagees as required by law. The case is therefore remanded to the first Court to try the same according to the instructions recorded above.

Morgan, J.—The purchaser of one of several villages given in zur-i-peshgee, seeks to redeem it on the ground that the portion of the mortgage debt with which it is chargeable has been satisfied, and the Lower Appellate Court has given him a decree. The zur-i-peshgeedar is entitled to retain the whole of the property pledged to him until the whole of the debt has been paid off. If he agrees to relinquish any portion, either on receiving a proportionate amount of what is

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due to him or otherwise, he may do so. In this case several of the villages given in zur-i-peshgee have been sold to different persons, and it seems probable that the zur-i-peshgeedars have consented to some division of the debt so that specific villages are liable only to a portion of the debt. But no such consent is found by the Court, and I cannot see on what ground the Court has appropriated to the mouzah now sued for a certain portion only of the original debt. I would remand the case that the Court may find distinctly the grounds on which the defendant has, by consent or otherwise, relinquished all claim to retain this mouzah except for a given portion of the debt.

The 1st June 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Resumption—Lakheraj—Settlement—Shikmee rights.

Case No. 2587 of 1863.

Special Appeal from a decision of Mr. J. C. Dodgson, Judge of Mymensing, dated the 17th June 1863, reversing a decision of the Principal Sudder Ameen of that District, dated the 22nd February 1863.

Grish Chunder Roy and others (Defendants) *Appellants,*

versus

Boydonath Dey and others (Plaintiffs) *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Baboo Debendro Narain Bose for Respondents.

Shikmee talookdars under lakherajdars whose lands have been resumed by Government cannot sue for a settlement. They can only claim to have their shikmee rights upheld.

Pundit, J.—The plaintiffs are purchasers of the rights of the shikmee talookdars under the lakherajdar. The rent-free tenure being resumed by Government, a settlement of the lands was ultimately made with the defendants, who represent the lakherajdar. Plaintiffs sue to set aside that settlement, and to obtain for themselves an independent settlement. It appears that the original lakherajholder had, long before the resumption by Government, given the lands as a shikmee talook to the vendors of the plaintiffs, reserving to himself a rent of rupees 10 annually. This right to receive the 10 rupees annually, was subsequently assigned to the defendants.

Had the plaintiffs claimed to have their shikmee rights upheld, they were clearly entitled for a decree, but they cannot be permitted to sue for a settlement of the mehal. For the purposes of the settlement, the lakherajdar is the person whom alone Government can recognise as the party in possession. The Settlement Officer might have, in the very order of settlement, made proper provisions for the protection of the rights of the shikmeedars represented by the plaintiffs. They cannot anyhow be allowed to ask for an independent settlement to the prejudice of the superior rights of the lakherajdar, who alone is entitled to the settlement. The precedent of 1855 is not on all fours with this case. On this view of the case it is not at all necessary to enquire whether, in case of the plaintiffs being entitled to the settlement the defendants should obtain a malikana, and, if any, to what extent.

We accordingly reverse the order of the Lower Appellate Court, and decree this special appeal with costs. This order is without prejudice to the rights of the plaintiffs to sue for their shikmee rights.

The 2nd June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Bills of Exchange—Hoondees—Joint Hindoo Family—Presumption.

Case No. 2493 of 1862.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 21st July 1862, reversing a decision of the Principal Sudder Ameen, dated the 28th September 1861.

Veliet Doss (Defendant) *Appellant,*

versus

Bunarussee Roy (Plaintiff) and others (Defendants) *Respondents.*

Mr. R. T. Allan for Appellant.

Mr. G. Gregory and *Baboo Banee Madhub Banerjee* for Respondents.

A hoondee payable to the depositor is only payable to the drawer or his indorsee. When the drawer and his brother are members of an undivided Hindoo family, it may be presumed that the latter is entitled to act for the former.

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Campbell, J.—THIS is a suit upon a hoondee payable to the "depositor" named in the bill. The defendant pleaded payment. It appears that the plaintiff having obtained the hoondee drawn in Calcutta on the defendant's bankers at Purneah, sent it to one Kashee, his own brother, at Purneah, as he alleges for the purpose of obtaining acceptance. Kashee not only got defendant's acceptance, but also obtained payment of the money, giving a receipt in his own name and that of plaintiff. The question is whether this payment is a payment to or for plaintiff.

The defendant alleges that, according to the custom of merchants, a hoondee payable to the *depositor*, is in fact a hoondee payable to bearer, provided the banker exercises due caution and pays to a respectable person. Further, that Kashee is, in truth, plaintiff's partner and agent, and entitled to receive payment and sign for the firm.

The first Court found both the custom and the alleged partnership, &c., in favor of defendant, finding that Kashee and the plaintiff were uterine brothers and united in business,

In appeal, the Judge considered the case to depend entirely on the question whether defendant was justified in cashing the bill to any receipt but that of plaintiff or his indorsee; and on that issue he decided against defendant. So far, taking the issue broadly, we think that he was right. We cannot find that anything has been established to vary on the ground of custom the plain terms of the hoondee, or to render its incidents materially different from those of an ordinary Bill of Exchange. We have no doubt that a payment to bearer is not sufficient, and that, if he had no better answer, the defendant would remain liable to Kashee.

But on the more special plea that Kashee was a partner and agent entitled to receive payment, we think otherwise. If Kashee and the plaintiff were members of a united family and carrying on business together, more especially when, as in this case, one brother being at Purneah, the bill on a Purneah banker is sent to him by the plaintiff, the fair presumption is that in this matter one was entitled to act for the other, and even that the bill was sent by one to the other for the special purpose of realizing the money. On the facts, as found by the Principal Sudder Ameen, we have no doubt that payment to Kashee on his receipt for self and plaintiff was sufficient payment. The Judge too seems to assume the existence of the firm, and in the absence of any finding to the contrary, we must presume the facts to be as found by the Principal Sudder Ameen, even if, as the Judge says, there is no proof of special authority to Kashee to sign for his brother. We, therefore, reverse the order, and decree the appeal with costs.

The 2nd June 1864.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Hindoo Law — Conditional sale by widow—Suit by or against reversioner—Mutation of names.

Case No. 2615 of 1863.

Special Appeal from a decision of Moulvie Iradut Ally Khan, Principal Sudder Ameen of Shahabad, dated the 23rd June, 1863, *reversing a decision of Moonshee Mahomed Abdool Luteef, Moonsiff of Sasseram, dated the 11th June* 1862.

Odit Narain Sing (Defendant) *Appellant,*

versus

Dhurm Mahtoon and others (Plaintiffs) *Respondents.*

Baboo Khettur Mohun Bose for Appellant.
No one for Respondents.

A conditional sale is an alienation the validity of which a reversioner to a Hindoo widow is, under the Hindoo Law, entitled to question.

In a suit for mutation of names by a purchaser from a Hindoo widow, the purchaser must prove the legality of his purchase if he chooses to bring an action against the reversioner.

Pundit, J.—PLAINTIFF sued to obtain an order for mutation of names regarding certain property purchased by him from a Hindoo childless widow, originally as a "bai bil-waffa," afterwards foreclosed into a sale. The special appellant, the reversioner, who was made a defendant, objected to the validity of the sale. The Court of first instance dismissed the claim on the ground that no legal necessity for the sale was proved. The Lower Appellate Court decreed the appeal of the plaintiff on the following grounds :—That during the lifetime of the widow no such issue can be raised by the reversioner ; that it is not known whether the reversioner will outlive the widow, or that the latter will survive the former ; and that the sale was not originally an absolute sale.

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It is clear that the conditional sale was an alienation, the validity of which a reversioner to a Hindoo widow is, under the Hindoo Law, entitled to question. Plaintiff, a purchaser from a Hindoo widow, must prove the legality of his purchase if he chooses to bring an action against the reversioner. We accordingly reverse the decree of the Lower Appellate Court, and remand the case to the said Court to try the question of the validity of the alienation.

The 2nd June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Evidence (of deed destroyed in the Mutiny).

Case No. 1831 of 1863.

Special Appeal from a decision passed by Moulvie Iradut Ali Khan, Principal Sudder Ameen of Shahabad, dated the 26th March 1863, reversing a decision of the Moonsiff of Peroo, dated the 30th December 1861.

Sheosurun Ojha (Plaintiff) *Appellant,*

versus

Mussamut Goolbanee Kooer and others (Defendants) *Respondents.*

Mr. T. T. Forbes for Appellant.

Baboo Mohesh Chunder Chowdry for Respondents.

Where a suit was brought on a mortgage deed alleged to have been destroyed in the mutinies,—HELD that, if it were established that the original deed was destroyed and that there was no copy of it in existence, the Court could receive oral evidence as to its contents and determine the question of the genuineness or otherwise of the deed on that evidence solely.

Trevor, J.—PLAINTIFF sued for the confirmation of his possession of a certain property mortgaged to him, the mortgage of which has been subsequently foreclosed under the terms of Regulation XVII of 1806.

The Moonsiff laid down the following issues:—1*st.*—Has the plaintiff's deed of mortgage been burnt or not in the mutiny; and, if so, can the present suit be entertained? 2*nd.*—Was the deed of mortgage a genuine deed or not? 3*rd.*—Did the plaintiff take all the necessary steps required by Regulation XVII of 1806 for the foreclosure of the mortgage?

The Moonsiff, then, in an elaborate and careful judgment, decided in favor of the plaintiff's claim, and gave him a decree.

The Principal Sudder Ameen, on appeal, laid down one issue, *viz.*, was the deed of mortgage genuine, and has it been rendered absolute in conformity with Regulation XVII of 1806?

In answering this issue the Principal Sudder Ameen has, in consequence of the non-production of the original deed or a copy of it, and in consequence also of the non-production by the plaintiff of customary evidence to the issuing of the notice under Regulation XVII of 1806, dismissed the plaintiff's claim, reversing the order of the first Court.

Plaintiff has now appealed specially, urging that the Principal Sudder Ameen has reversed the elaborate decision of the Moonsiff with a few curt remarks, which show that he has only imperfectly enquired into the case, and that, consequently, the suit should be remanded for re-investigation.

The main issues in this case have been lumped up together by the Principal Sudder Ameen, and he, in answering his sole issue, has relied on facts which should first have been determined by him in a sort of subordinate issue as was done by the Moonsiff.

The plaintiff sues on a deed which has been burnt, of which a copy has not been procured, a copy not being procurable, and he has rested simply on oral evidence.

Now, it is invariably the rule that the best evidence should, in every possible case, be produced. In this case the deed was the best evidence, the authenticated copy the next best, and after that comes the extrinsic evidence to the deed, *viz.* the oral testimony. The Moonsiff in his first issue found that the best evidence had been burnt, that the second best was not procurable, and that, consequently, the plaintiff's present suit, resting on the oral testimony, was tenable. This is a point which the Principal Sudder Ameen should have first determined, instead of which he gives as a reason for discrediting the plaintiff's evidence, the fact of the non-production of the deed which, it is alleged, has been burnt. By this confused method of dealing with the evidence of the plaintiff, on the first issue, injustice has been done. Again, the Principal Sudder Ameen says that customary evidence has not been given of the service of the notice of foreclosure. Now, we find that the evidence of the parties whose names are endorsed on the notice and who were witnesses to the same, was taken. The use, therefore, of the word

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"customary" is unintelligible. We, therefore, remit the case to the Principal Sudder Ameen, directing him to give an opinion, 1st, as to whether plaintiff has clearly proved to him that the deed of mortgage has been burnt, and whether a copy of the deed is procurable or not. If the plaintiff proves these to the satisfaction of the Principal Sudder Ameen, he will then proceed to try, relying solely on the oral evidence produced, the genuineness or otherwise of the deed of mortgage, and subsequently, he will, if necessary by his finding on the above issue, try whether the notice under Regulation XVII of 1806 has been in legal form served or not. In trying this issue he will note every deposition of every witness, and state clearly why he discredits the same. If he find these points in favor of the plaintiff, he will then pass in favor of the plaintiff a decree confirmatory of that of the Lower Court; if otherwise, he will dismiss his claim.

The 2nd June 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Fraudulent Transfer by Father.

Case No. 43 of 1864.

Regular Appeal from a decision passed by Baboo Huro Chunder Chatterjee, Principal Sudder Ameen of West Burdwan, dated the 18th December 1863.

Hurry Sunker Mookerjee (Plaintiff) *Appellant,*

versus

Kali Coomar Mookerjee and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Baney Madhub Banerjee* for Appellant.

Baboos Dwarkanath Mitter and *Unnoda Persad Banerjee* for Respondents.

A father who transferred property to his sons for the sake of defrauding creditors, and permitted the sons to put forward claims on the property founded on a title inconsistent with his own, was held to have created a state of circumstances in which the sons were entitled to say that he could not afterwards sue to recover the property from them.

Morgan, J.—We think that this judgment must be affirmed, and we concur generally in the reasons given by the Court below. The question in this case between the father and his sons is not what it would be in a suit by a creditor or third person seeking to attach the property as belonging to one or the other. In such a suit the plaintiff would have a right to show whose, in fact and in truth, the property was. But here in this suit between these parties, they themselves, by their own conduct and acts and admissions, have given rise to a conventional state of things which, although it may not be the actual, must be taken to be the truth as between themselves. What has occurred seems to amount to this, that the plaintiff, for reasons which he explains (namely, because of disputes in the family and the wasting of the property thereby, and because of suits by the Maharaja of Burdwan and other persons, whereby the family patrimony was in danger), thought fit for safety to assign what remained of it into the names of persons other than himself. The meaning which we attach to this statement is, that he wished to put his property in such a position (having lost a portion of it) as would render the remainder secure from creditors. That is a fraudulent and unlawful purpose.

The subsequent proceedings have been of this kind. The sons have, on some occasions, interfered in the execution of decrees against the father, putting forward distinctly their claims to this property and claiming it as property purchased with their mother's stridhun. The father, doubtless, was well aware of the claims so put forward. He has never in any way interfered or contradicted them until the period of the present suit. The case seems to us to be one in which he transferred his property into the names of other persons, his sons, for the purpose of defrauding creditors. Whether any creditors were actually defrauded thereby or not, is immaterial; and he has also permitted the persons to whom the property was so transferred, to put forward claims to the property founded on a title inconsistent with his own. His conduct seems to us to have created a state of circumstances in which the defendants are entitled to say that he cannot recover the property from them in this suit. We shall affirm the judgment of the Court below and dismiss the appeal; but with this variation, that the shares to be decreed to the plaintiffs will be not one-half, which the Court has awarded, but only $\frac{2}{5}$ths of the whole, the remaining $\frac{3}{5}$ths being to the extent of $\frac{2}{5}$ths the shares of the two sons in possession, and $\frac{1}{5}$th of the fifth brother, whom the Lower Court had entirely passed over. The costs of both the Courts are to be in proportion to the shares decreed and dismissed.

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The 6th June 1864.

Present :

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Indigo Factory—Bond by former proprietor—Suit against present proprietor—Presumption.

Case No. 2585 of 1863.

Special Appeal from a decision passed by Mr. W. T. Tucker, Officiating Additional Judge of Sarun, dated the 1st June 1863, reversing a decree of Moulvie Waheedooddeen, Principal Sudder Ameen of that District, dated the 20th May 1862.

Mussamut Hubeebunissa and others (Plaintiffs) *Appellants,*

versus

Mr. James Cox and others (Defendants) *Respondents.*

Mr J. Baptist for Appellants.

Baboos Mohesh Chunder Chowdry and *Kishen Succa Mookerjee* for Respondents.

Where a suit was brought on a bond by the former proprietor of an indigo factory, and the holder of the bond was proved to have lain by for 12 years without making any demand on it or without apprising the different assignees of the factory of the existence of the debt as one due by the factory,—HELD that the plaintiff was not entitled, after the lapse of so many years, to come down on the present proprietors of the factory, but that he must be held to have elected to look alone to the obligor of the bond for satisfaction of the debt, making it purely personal with the obligor.

Levinge, J.—This was an action on a bond, dated the 11th of October 1850, given for one year's rent due for the year 1257, corresponding with the year 1850, by one Godfrey de Miss, the former proprietor of the indigo factory, to the landlord, the plaintiff. It appears that since the date of the bond, the factory has several times changed hands, and the present owners are the defendants Mr. James Cox and others. It is also stated that the subsequent kists of rent have been regularly paid, but the debt on this bond for the rent of 1257 has been allowed to remain dormant and unclaimed. It is also stated, and not denied, that the defendants, when they took over the factory from their assignors, were wholly ignorant of the existence of this bond, and for a very good reason, for it seems that the assignors, the late proprietors, were never made acquainted with it being a debt due by the factory. No demand on foot of the bond appears ever to have been made since its execution until the present action, nearly 12 years.

The defendants put in several defences. They first put the plaintiff on proof of the bond ; then, on proof of the non-satisfaction of the debt. They deny liability, and plead that the subsequent receipts of rents are sufficient to invalidate the bond. The Principal Sudder Ameen, who first heard this case, in his decision dated the 20th May 1862, held the defendants liable on the bond, finding its validity established by the evidence, stating "that although the former proprietors "of the factory have not entered this amount "due under the bond in the lists of arrears "which have been given to the present "proprietors, the purchasers of the factory, "that fact cannot invalidate the claim."

From this decision the defendants appealed, and the Judge, on 20th May 1862, reversed that decision stating "that the delay "in bringing the suit, the changes that have "occurred in the proprietary of the factory "without mention of the bond, and more "particularly the discharge in full for the "rent of subsequent years given by the "plaintiffs, prove beyond doubt that the "amount of this bond was discharged when "it became due on the 31st December "1851 and that the appellants are not "liable."

From that decision the plaintiffs have preferred the present special appeal, arguing that the reasons of the Judge are purely conjectural ; that having found the bond to be genuine, there was no evidence to warrant the Judge holding that it had been satisfied, and also that the mere payments of subsequent kists of rent were no bar to the plaintiff's recovering in an action on the bond, as a specialty debt for an earlier kist of unpaid rent.

We think that the fact of plaintiff, as holder of the bond, lying by for so many years without making any demand on it, or apprising the different assignees of the factory of the existence of this debt, as a debt due by the factory, disentitles him now after the lapse of so many years, to come down on the defendants and make them liable as proprietors of the factory. It seems to us that these facts warrant the ruling that the plaintiff must be held to have elected to look alone to the obligor of the bond for satisfaction of the debt, making it purely personal with the obligor. We think it would be highly inequitable and even contrary to the intention to be gathered from the acts of the plaintiff, to fix the defendants with this debt. It has been lately ruled by the majority of a Full Bench of five Judges in the case of Bhowanee

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Churn Mitter, plaintiff, respondent, *versus* D. H. Kearnes, defendant, appellant,* that the creditor of an indigo factory, according to the practice regulating the custom of the *dena-powna*, cannot compel the proprietor of the factory to pay to him a debt which that proprietor did not undertake to pay when he took over the factory. In the case now before the Court, neither the defendant nor his assignee, the late proprietor, were aware of the existence of this debt which has suddenly been sprung as a pocket instrument on the defendant. The plaintiff must be held to have looked alone to the obligor for satisfaction, and cannot now avail himself of the doctrine of the *dena-powna* to saddle the defendant with this debt. We dismiss this special appeal with costs.

The 6th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Julkur Rights (of a Pergunnah).

Case No. 2870 of 1863.

Special Appeal from a decision passed by Mr. J. Reilly, Principal Sudder Ameen of Dinagepoor, dated the 29th June 1863, reversing a decision of the Moonsiff of that District, dated the 5th of July 1861.

Kooroonamoye Chowdrain (Plaintiff) *Appellant,*

versus

Joy Sunker Chowdhry (Defendant) *Respondent.*

Babuo Mutty Lall Mookerjee for Appellant.

Baboos Sreenath Doss and *Greeja Sunker Muzoomdar* for Respondent.

A proprietor of the entire julkur rights of a pergunnah is entitled to fish in any natural water-course or any jheel or pond not made by human agency.

Glover, J.—SPECIAL appellant, plaintiff in the Court below, sues to recover possession of a "dara" or canal which he alleges to have been dug by one of his ryots, named Goāloo, for the purpose of irrigating his fields, and of which the defendants who held the julkurs of the pergunnah, have dispossessed him by an award under Act IV of 1840. The defendants allege that the "dara" in question is a natural water-course, the half dry bed of a river, and that, as they have purchased the julkur rights of the entire pergunnah, they are, of course, entitled to catch fish in that or in any other natural water.

The Court of first instance held that the "dara" was an artificial canal dug for irrigation purposes, and had never been the bed of a river.

The Principal Sudder Ameen, on the contrary, found that it was a natural water-course, the half dry bed of an old dry river, and therefore appertaining to the julkur of the pergunnah.

The only objection taken before us in special appeal is, that the Principal Sudder Ameen has applied a wrong principle of law to the case, with reference to the late Sudder Dewanny Adawlut precedent, dated 24th November 1856.

We see no reason to interfere. The precedent quoted by the special appellant refers to an entirely different state of circumstances. It was held in that case that the owner of a julkur of a river was not entitled to take fish in pools of standing water, formed by inundation on or near to the banks of the river; his rights were confined to the river itself.

In the present case the special respondent is the undoubted proprietor of the entire julkur rights of the whole pergunnah, and is entitled to catch fish in any natural water-course or in any jheel or pond not made by human agency. The Principal Sudder Ameen has found by local enquiry that the "dara" in this present case is not an artificial canal dug for irrigation purposes, but the bed of a river still visibly connected with other rivers in which pools of water are still existent. There can, we think, be not the least doubt that these are rightly included in the julkur of the pergunnah; and that the special respondent, so long as water remains in the "dara," is entitled to keep possession and to catch fish therein.

We dismiss this appeal, therefore, with costs.

* See Sutherland's Full Bench Rulings, p. 167.

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The 8th June 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Sale by Hindoo Widow—Consent of reversioners.

Case No. 2677 of 1863.

Special Appeal from a decision passed by Moulvie Mahomed Nazim, Principal Sudder Ameen of Mymensing, dated the 19th June 1863, affirming a decision of the Moonsiff of that District, dated the 30th August 1862.

Kartick Kurmokar and others (Defendants) *Appellants*,

versus

Dhunno Monee Goopto (Plaintiff) *Respondent*.

Baboo Annund Chunder Ghosal for Appellants.

No one for Respondent.

The consent of all the heirs living at the time of the execution of a bill of conveyance by a Hindoo widow, either directly or by attestation, is requisite to make the sale binding against the reversioners.

Kemp, J.—We think that the decree of the Court of first instance must be affirmed. It appears that Dropodee, a childless widow, sold certain properties with the consent of the then reversioner, Dabee Pershad, and on the attestation to the bill of sale by Shumboo Nauth, another reversioner. Dabee Pershad died before the title to the property of Gunga Persad, the husband of Dropodee, became vested in him; but Shumboo Nauth's consent is binding upon him, and the 2 annas which represents his share has been properly held by the Court of first instance to belong to the purchasers.

With reference to the share of Kassee Nath (also a 2 anna share) we think that, as there is nothing to show his consent to the alienation, the doctrine laid down in the case of Ameena Khatoon *versus* Radhabenode Misser, dated 21st July 1856, as also an old decision of 31st August 1812, which shows that this has been a long recognized established law of this Court, applies. The consent of all the heirs living at the time of the execution of a bill of conveyance by a Hindoo widow, either by direct consent or attestation, is requisite to make the sale binding against the reversioners. The consent of Kassee Nath not having been obtained, the decision of both Courts below is right as to his share. But with reference to the share of Shumboo Nauth, who was a consenting party, the decision of the Principal Sudder Ameen must be amended, and the appeal decreed with costs and interest in proportion.

The 8th June 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Lunatic—Right of suit—Verification of plaint.

Cases Nos. 449 to 451 of 1863.

Regular Appeals from a decision passed by Mr. F. J. Cockburn, Officiating Additional Judge of the 24-Pergunnahs, dated the 23rd May 1863.

Brindabun Chunder Kur Chowdhry (Plaintiff) *Appellant*,

versus

Kali Dass Sircar and another (Defendants) *Respondents*.

Baboos Kali Prosunno Dutt and *Nil Madhub Bose* for Appellant.

Baboos Dwarkanath Mitter, Kali Mohun Doss, Kishen Succa Mookerjee, and *Gopal Lal Mitter* for Respondents.

There is no ruling of law which renders a lunatic incapable of suing in a Court of Law to obtain redress for injury, or of verifying a plaint, if he is capable of understanding it.

Norman, C. J.—The plaintiff in these cases had filed copies of certain taidads of 1209 in another suit in the Court of the Principal Sudder Ameen. The Principal Sudder Ameen in that suit sent for the originals. In the present suits he presented a petition to the Principal Sudder Ameen, under Section 138, praying that the Principal Sudder Ameen would send for the documents, which would have been material evidence for him in the present suits. The Judge sent for these causes from the Court of the Principal Sudder Ameen, took them up, and tried them himself, but passed no orders on the petition under Section 138, except that, at the conclusion of the hearing, he refused to send for the taidads, though required to do so by the plaintiff, saying it was too late. In case No. 444, of which the facts were similar in many respects to those of the present, the High Court, relying on taidads of 1204, reversed the Judge's decision. As we think that some order ought to have been

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passed on the petition under Section 138, and that these cases have been tried in the absence of what appears to have been important evidence, we remand the cases for proper trial to the Lower Court, and the Judge will send for the original taidads.

A preliminary objection was taken that the plaintiff was a lunatic, and therefore could not sue. But there is no rule of law which renders a lunatic incapable of suing in a Court of Law to obtain redress for injury. The Judge thinks that a lunatic could not verify a plaint. But that would appear to be a mistake. There seems no reason why he should not do so, if he is capable of understanding it. (*See* Act II of 1855, Section 14 Clause 2.) If he appeared to the Judge incapable of understanding the plaint, steps might perhaps have been taken for the appointment of a guardian under Act XXXV of 1858.

The 8th June 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Jurisdiction—Defamation of character—Suit for damages.

Case No. 2694 of 1863.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-*Pergunnahs, dated the* 27*th August* 1863, *modifying a decision of Mr. H. C. Bell, Principal Sudder Ameen of that District, dated the* 29*th October* 1862.

Kanoo Mundle (Plaintiff) *Appellant*,

versus

Rahumoollah Mundle and others (Defendants) *Respondents*.

Roy Sreenath Sein for Appellant.

No one for Respondents.

A Civil action for damages lies for defamation of character.

Norman, C. J.—The plaintiff sued for damages for defamation. The Principal Sudder Ameen found that the defendants abused the plaintiff, making use of such expressions as tended to lower him in the eyes of others. The words which are of the coarsest abuse, do undoubtedly impute that to the plaintiff which would, if believed, have been hurtful to the feelings of his family and have lowered his character in respect of his caste, and the uttering of them, therefore, amounts to an offence under Section 499 of the Penal Code. Applying the test familiar to English Law, the uttering of the words in question, standing by itself, was a wrong, and therefore gave to the individual aggrieved by it a right of action independently of any proof of special damage or actual pecuniary injury (*see* Roscoe on Evidence, page 537). The Principal Sudder Ameen gave judgment for the plaintiff for 1 rupee damages and full costs. The Judge reversed this decision, admitting that there was ground for complaint to a Magistrate, but saying that there was no ground for a Civil action for damages. For the reasons above given, we think this opinion is erroneous, and we therefore reverse the decision of the Judge and affirm that of the first Court, with costs and interest.

No doubt, actions for slander are often vexatious. But to prevent people from taking the law into their own hands, and for the preservation of peace and order, it is a matter of the greatest importance that Courts of Justice should afford an effectual remedy to persons feeling themselves aggrieved by wanton and virulent abuse.

The 8th June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges*.

Lease (Cancelment of).

Case No. 3350 of 1863.

Special Appeal from a decision passed by the Judge of Purneah, dated the 25*th August* 1863, *affirming a decision of the Principal Sudder Ameen of that District, dated the* 20*th November* 1862.

Omritnath Tewaree (Plaintiff) *Appellant*,

versus

Buggoo Singh and others (Defendants) *Respondents*.

Baboo Banee Madub Banerjee for Appellant.

Mr. John Baptist and *Baboo Greeja Sunkur Muzoomdar* for Respondents.

A landlord may cancel a lease on an adjudged arrear, before the expiration of the term of it.

Steer, J.—The plaintiff sues for mesne profits for 1265 and for arrears of rent due

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from tenants which he has been prevented from realizing by the act of the defendant.

It appears that the plaintiff who was a farmer defaulted to pay his rents. The landlord sued him, got decrees against him, appointed a sezawal to collect the rents, afterwards cancelled the farm, and put the defendant Buggoo Sing upon the property as a putneedar.

It is urged that the Court below has regarded the appointment of a sezawal as the cancelment of the lease; but the Court below distinctly says that the landlord first attached the plaintiff's lands through a sezawal, and afterwards cancelled the lease. The appointment of the sezawal was one measure; the cancelment of the lease was another. They are two distinct acts, and there is no ground for supposing that the Lower Court viewed the appointment of the sezawal as the act which cancelled the lease.

It is also objected that there is no proof that the landlord cancelled the lease; but the Judge has found as a fact that he did cancel the lease, and putting in of a new man is clear proof of it.

It is next objected that neither of the Courts have expressed any opinion as to whether the defendant was not liable to make good the outstanding arrears of rents due to the plaintiff from the tenantry. But the Courts have dismissed the whole claim of the plaintiff, and have thus decided that the plaintiff is not entitled to recover. The landlord, in the exercise of a legal right, has turned out the plaintiff and put another man in. The plaintiff may have arrears due to him from the tenantry and, if so, he can sue them for it; but the defendants have done no wrong that they should be held liable to pay these arrears to the plaintiff.

It is objected, finally, that the landlord had no power to cancel the lease before the expiration of the term of it, and that all he could do was to appoint a receiver to make the collections. But there is clear authority in Regulation VIII of 1819 and in Constructions 42 and 1205 for the cancelment of a lease on an adjudged arrear; and as in the present case there is no question that decrees had been given against the plaintiff, and it is not pleaded that those arrears were satisfied, the landlord was clearly warranted in cancelling the lease.

None of these grounds being in our opinion valid, we support the judgment, and dismiss the special appeal with costs.

The 8th June 1864.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Transferable tenure — Relinquishment.

Case No. 3012 of 1863.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Dacca, dated the 19th August 1863, reversing a decision of the Moonsiff of that District, dated the 8th November 1862.

Chundermonee Nya Bhooshun and another (Defendants) *Appellants,*

versus

Sumbhoo Chunder Chuckerbutty (Plaintiff) *Respondent.*

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Appellants.

Baboo Kally Mohun Doss for Respondent.

A voluntary abandonment of a permanent and transferable tenure, for a long period without any inevitable force, major or other cause beyond the power of the holder, is tantamount to an express relinquishment. If a man so abandons his holding for years, neither he nor any one under him can reclaim it.

Campbell, J.—The facts are found from the depositions of the zemindars, *viz.* that one Rammoney originally held the disputed howla. He deserted it, leaving the rent unpaid. Several years after, the present plaintiff came to the landlord, alleging that he had a mortgage on the tenure, produced the pottah, surrendered it, and took a new pottah in his own favor. Two years after that, the original zemindar having in the meantime died, the defendant (now special appellant) came to his son alleging a purchase from Rammoney and obtained a pottah, on the strength of which he ousted the plaintiff. The Lower Appellate Court, on the ground that plaintiff's pottah is prior to defendant's pottah, decreed in favor of plaintiff.

Special appellant urges that he holds under Rammoney, not under a new title, and that the relinquishment of Rammoney has not been found. But we think that it has been found as a fact, on the deposition of the zemindars, that Rammoney relinquished the land.

Appellant further urges that the howla being a permanent and transferable tenure, mere abandonment is not a valid relinquishment; that the zemindar was bound to proceed against the tenure in due course

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of law. But we think that a voluntary abandonment for a long period without any inevitable force, major or other cause beyond the power of the holder, must be considered to be equal to an express relinquishment; and that, if a man so abandons his holding for years, neither he nor any one under him can reclaim it.

Considering, therefore, that Rammoney's right had lapsed, and that defendant took an entirely new title, we dismiss the appeal with costs.

The 8th June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Partition—Tenant rights.

Case No. 3356 of 1863.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 25th August 1863, affirming a decree of the Principal Sudder Ameen of that District, dated the 13th May 1863.

Nuthoo Lall Chowdhry and others (Plaintiffs) *Appellants,*

versus

Saadat Lall and others (Defendants) *Respondents.*

Mr. John Baptist for Appellants.

Baboos Mohesh Chunder Chowdhry and *Kally Mohun Doss* for Respondents.

A butwara does not extinguish rights of tenants; and the mere circumstance that one of the proprietors of the estate was himself the tenant, does not destroy his tenant-right, because another of the proprietors has had the land allotted as part of his share of the divided estate.

Steer, J.—It appears that the plaintiff and defendant were joint owners of a property in which one Ram Dyal held as a tenant the garden in dispute. The defendant bought his tenant-right from Ram Dyal, and, in a butwara afterwards made, the garden fell to the lot of the plaintiff. The plaintiff now sues to dispossess the defendant, and his suit has been dismissed on the ground that Ram Dyal was the tenant of the garden, and that he sold his tenant-right to the defendant.

It is contended in special appeal that the Lower Court has accepted as evidence certain farkhutties which were not admissible as such; but the Judge did not rely upon these farkhutties alone, so that his judgment is not open to objection on the ground taken.

It is then contended that, as there was a butwara between plaintiff and defendant, and the disputed lands were allotted to the plaintiff, no claim of any prior existing tenant-right can be set up by the defendant. This objection is not taken in the written grounds of special appeal; and we are of opinion that the butwara between the plaintiff and defendant did not extinguish the rights of tenants; that, if there was a tenant of the garden at the time of the butwara, that tenant continued to be tenant after the butwara, and the mere circumstance that one of the proprietors of the estate was himself the tenant, does not destroy his tenant-right, because another of the proprietors has had the land allotted as part of his share of the divided estate. On these grounds, we dismiss the special appeal with costs.

The 8th June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Section 39 Act VIII of 1859—Evidence—Documents not filed with plaint—Stamp.

Case No. 3355 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 27th August 1863, reversing a decision of the Moonsiff of that District, dated the 30th January 1863.

Atta Oollah Mundle (Defendant) *Appellant,*

versus

Sukeeooddeen Turupdar (Plaintiff) *Respondent.*

Baboo Juddoonath Mookerjee for Appellant.

Mr. R. E. Twidale for Respondent.

According to Section 39 Act VIII of 1859, a Lower Court may receive in evidence from the plaintiff a document (*e. g.* a pottah on which he relies) not filed with the plaint, on being satisfied of its *bonâ fides* and reliableness. The pottah being on plain paper, does not render it invalid.

Levinge, J.—The sole question in this case is—had the Lower Appellate Court power to receive a pottah relied on by the

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plaintiff not filed with the plaint? We hold the Court had, and that a Court can receive a document in evidence from the plaintiff, not filed with the plaint on being thoroughly satisfied that the document is in every respect *bonâ fide* and worthy to be relied on; *vide* Act VIII of 1859, Section 39; and on special appeal we cannot interfere with that discretion. The pottah being on plain paper, does not render it invalid. Appeal dismissed with costs.

The 8th June 1864.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Adoption—Inheritance—Hindoo Widow—Limitation.

Case No. 2966 of 1863.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 28th July 1863, affirming a decision of the Principal Sudder Ameen of that District, dated the 10th January 1863.

Radha Kissoree Dossee (Plaintiff) *Appellant,*

versus

Guthee Kissen Sircar (Defendant) *Respondent.*

Baboo Bhuggobutty Churn Ghose for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

In a suit by a daughter to inherit immoveable property by setting aside the adoption of the defendant made by her mother (a Hindoo widow).—HELD that the plaintiff's cause of action arose from the date of the adoption, and that her suit was governed by 12 years' limitation from that date.

Campbell, J.—IN this case plaintiff sues for certain immoveable property by setting aside an adoption. The adoption took place (as stated by the pleader for plaintiff, special appellant) in 1249. The adopting mother died in 1258. Plaintiff, her daughter, brought this suit in 1269. Subsequent to the mother's death, the plaintiff claimed the property under Act XIX of 1841, but 6 months having elapsed, the Judge refused to hear her. The Judge thinks the plaintiff is barred by the expiry of one year under Clause 5 Section 1 of Act XIV of 1859; also that her cause of action arose from the date of the adoption, and that she is barred by the expiry of 6 years from that date.

As in the summary suit the Judge passed no decision or order whatever which plaintiff desires to set aside, we do not think that the one year rule of limitation applies. We also think that the 6 years' rule can in no sense apply to this suit of inheritance for immoveable property. But we are clearly of opinion that the Judge was right in considering that the cause of action arose from the date of the adoption. That is not an alienation of the widow's rights. It is a proceeding by which the widow's rights are absolutely determined and vested in another. From the moment of the adoption, defendant acquired a status as owner of the property altogether adverse to plaintiff. There was an adverse possession of which plaintiff as daughter of the house could not possibly have been ignorant. The mother ceased to hold as widow, and could only continue to hold avowedly before the world as guardian of the son. On this ground, more than 12 years having elapsed since defendant was set up as adverse owner, we dismiss the appeal with costs.

The 9th June 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble F. B. Kemp, *Judge.*

Section 138 Act VIII of 1859—Duty of Court to send for records.

Case No. 2717 of 1863.

Special Appeal from a decision passed by the Judge of Patna, dated the 28th January 1863, affirming a decision of the Moonsiff of that District, dated the 29th July 1862.

Mussamut Janokee Bebee (Plaintiff) *Appellant,*

versus

Shah Habeebul Hossein (Defendant) *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Debendernarain Bose and *Moulvie Murhummut Hossein* for Respondent.

Under Section 138 Act VIII of 1859 a Court is not bound to send for the whole record, but only for such papers as may be specifically mentioned in the application.

Kemp, J.—WE think that this appeal must be dismissed. The suit of the special appellant was based upon a bill of sale which she did not file with her plaint, nor give any

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reason for her being unable to do so. She applied subsequently in a general way to the Court of first instance to send for records, without specifying the particular document or documents upon which she relied, and which she wished the Court to inspect.

It is now urged that, under Section 138, the Lower Court was bound to send for the whole record ; but we think that this is a wrong construction of that Section, the duty of the Court under it being confined to sending for such papers as may be specifically mentioned in the application.

The appeal is dismissed with costs and interest.

The 9th June 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Resumption Proceedings—Jurisdiction (of Civil Court).

Cases Nos. 446 and 470 of 1863.

Regular Appeals from decisions passed by Baboo Gunga Churn Shome, Principal Sudder Ameen of Dacca, dated respectively the 27th May and the 15th June 1863.

Case No. 446.

The Collector of Dacca (Defendant) *Appellant,*

versus

Kishen Kishore Chatterjee and others (Plaintiffs) and others (Defendants) *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.
Mr. R. T. Allan for Respondents.

Case No. 470.

Jugo Bundhoo Bose and others (Plaintiffs) *Appellants,*

versus

The Collector of Dacca and others (Defendants) *Respondents.*

Baboos Dwarkanath Mitter and *Chunder Madhub Ghose* for Appellants.

Mr. R. T. Allan and *Baboo Kishen Kishore Ghose* for Respondents.

If lands adjudged to Government in a resumption suit, diluviate and reform on the same site, Government does not thereby lose its rights to them, nor is it obliged to institute wholly new proceedings. Diluvion does not create any new right.

Resumption proceedings are final and not liable to question by the Civil Courts. But when proceedings take place in the nature of extensive settlements with other parties after intermediate and temporary settlements, and acts are done wholly without jurisdiction or lands are taken not included in the original decree, there should be a remedy to parties deeming themselves to have been wronged thereby.

Seton-Karr, J.—THESE two suits arise out of the following circumstances :—The Resumption Authorities instituted a suit for the resumption of a large chur termed Mudun Sankar, and obtained a decree for the same on the 11th of November 1846. This was subsequently confirmed by the Judges of the Sudder Court, acting as Special Commissioners, on the 28th of February 1855. Both the plaintiffs in the two suits were parties to the resumption proceedings. The decree of 1855 was followed up in 1857 by certain proceedings of the Revenue Authorities, who made settlements of the chur in question ; and though the present plaintiffs objected to the proceedings and claimed portions of the chur as diluviated and reformed lands of their own, they were unsuccessful, the Judge, as Special Commissioner, having approved of the proceedings of the Revenue Authorities.

Both the plaintiffs have now sued for portions of the lands taken by the Deputy Collector in 1857, as wrongly included in the chur called Mudun Sankar. In case No. 446 the claim has been decreed, and in case No. 470 it has been dismissed.

The appeal in case No. 446 has been first argued before us on the part of Government, on the ground that the resumption proceedings, commencing in 1846, and terminating in 1857, are final, and are not liable to be questioned by the Civil Courts under the precedent of Hur Gobindo Bose, page 131, Summary Decisions of the late Sudder Court, and other decisions for 1850, page 459, and 1851, page 454. And it is urged that the Lower Court has wrongly overruled this plea, on the ground that Act IX of

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1847 applies. On the other hand, it is urged for the successful plaintiff that, when the lands diluviated and reformed, as the Deputy Collector in his proceedings of 1857 admits that they did, Government had no right to lay hand on them until 10 years had elapsed, and until a survey had taken place, as provided for by Section 7 of Act IX of 1847. Neither of these formalities have, it is contended, been observed. We have heard both parties at some considerable length on this point of jurisdiction, and we are of opinion that the reasons given by the Lower Court for overruling the same in the plaintiff's favor are not quite sound. The suits pending and appealable before Special Commissioners for resumption would be exempted from the operation of the Act by Section 9 of the same, and there is no validity in the argument that, if any of the lands adjudged to Government by the Resumption Authorities should have diluviated and reformed on the same spot, Government would thereby lose its right to the same, and would be compelled to institute wholly new proceedings; still less can we hold that the act of diluvion created any new right in the plaintiff's favor.

But the reasons which, on the whole, have induced us to enquire into the merits of this case, are that we are not satisfied that the proceedings of the Revenue Authorities of 1857 were, in reality, proceedings which merely carried out execution of the decrees gained by Government in 1846 and in 1855. We fully recognize the correctness of the principles laid down on several occasions by the late Sudder Court, that resumption proceedings are final, and are not liable to question by the Civil Courts. But the proceedings of the Deputy Collector of 1857 seem to us to have been something more than mere proceedings in execution of decree. They were proceedings in the nature of extensive settlements with other parties, after intermediate and temporary settlements had taken place; and we think it consonant to law and justice, as well as not opposed to the precedents of the late Sudder Court that if, on such occasions, acts should be done wholly without jurisdiction, or lands should be taken not included in the original decree, there should be a remedy to parties deeming themselves to have been wronged thereby.

In this view we have heard case No. 446 on its merits. But being of opinion that the decree of the Lower Court in the plaintiff's favor was extremely confused, illogical, and unintelligible, we very soon called on the respondent to support it by the maps and evidence. The maps, we find, filed in this case, are of an extremely cumbrous and diffuse character, and reflect great discredit on the officials who prepared such unmanageable documents; but on a careful comparison of them, we found that, so far from supporting the plaintiffs' claim, they wholly made out that of the defendant. The maps which, in their main features, are perfectly reconcileable, show clearly that the plaintiffs are attempting to take the best part of what is really Mudun Sankar Chur, or the chur of which Government has been declared the owner; that the main stream of the Puddha did flow to the west of this chur, and not in the place which the plaintiffs would assign to it; and that the simple explanation of the present vexatious claim raised by the plaintiffs is to be found in the facts stated by the Judge and Special Commissioner in 1861, namely, that a small branch of the main river had gradually widened and opened a channel through the Chur Mudun Sankar, thus cutting the property of Government into two pieces, and suggesting to plaintiffs the notion of coming forward and claiming the same as part of Chur Kishtonuggur *alias* Muhadebpore and Manicknuggur. The plaintiffs have very little evidence to adduce except the maps, and that of no positive value; and, as already remarked, the maps, when carefully examined, entirely establish the position and claim of the defendant.

The two decisions of the Lower Court are, moreover, wholly irreconcileable and inconsistent with each other, and the order in case No. 446, giving the plaintiffs' lands on the western branch of the Puddha, with a confused definition of their plan, is almost unintelligible, and would certainly have been quite impossible to execute.

Case No. 470, it is admitted, was incapable of being argued in appeal.

We have, consequently, now only to restore matters to their original position, by decreeing the appeal in case No. 446, and dismissing the same in No. 470. Government will get its separate and entire costs in the actions, and so will the other defendants who have supported the Government.

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The 9th June 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Rights of Fishery.

Case No. 2013 of 1863.

Special Appeal from a decision passed by Baboo Tarucknath Sein, Principal Sudder Ameen af the 24-Pergunnahs, dated the 23rd December 1862, affirming a decision of Baboo Peary Lall Banerjee, Moonsiff of Chowkey Putterghatta, dated the 10th May 1861.

Ram Dass Surmah and others (Plaintiffs) *Appellants*,

versus

Sonatun Goohoo and others (Defendants) *Respondents*.

Baboo Otool Chunder Mookerjee for Appellants.

Baboo Prosunno Coomar Sein for Respondents.

A has no right to erect a bund on his own land so as to intercept the passage of fish in a natural stream, and thereby render *B*'s right of fishery less profitable. But if the bund has existed for many years without complaint, *B*'s right of fishery must be deemed subject to *A*'s right to keep up the bund.

Norman, C. J.—THIS is a suit for the interruption of a fishery right. The plaintiff claims as the lessee of an exclusive right of fishery in a khall which passes through the estate of the proprietors of Nowparah, and alleges that one Ahmed Mundul obstructed the passage of fish by putting up a bund across the khall in his own land on the western extremity, or mouth of the khall; that Sonatun Goohoo obstructed the south-eastern mouth, and Ram Narain Mundul, the north-eastern mouth; and that the two latter defendants caught fish within the limits of the plaintiff's fishery. The first Court found that the only obstruction to the passage of fish was by the bund on the west, but that this bund being on the land of Ahmed, he had a right to erect it. It also found that the other defendants had caught no fish by putting up bars on any land on which the plaintiff's julkur exists, and dismissed the suit. The Principal Sudder Ameen, on appeal, found that the bund put up by Ahmed was not a new erection, by which he meant that it existed in 1842, at the time of an Act IV award, which was in evidence, and on other points affirmed the decision of the Court below.

The plaintiff appeals and urges before us that he has a right of action if the defendants, by putting up bunds on their own land, intercepted the passage of fish in the khall, which is a natural stream, and thereby rendered his right of fishery less profitable; and he referred us on the subject to a passage in Kent's Commentaries, where the case of Weld *versus* Hornby, 7 East, 195, is cited and relied on. We accede to his argument so far as to agree in the soundness of the proposition of law. But we find that the right of fishery must, after the lapse of so many years, be deemed to be subject to the right of Ahmed to keep up the bund as it formerly existed; and, as no interruption by any one else is proved, the judgment of the Principal Sudder Ameen dismissing the appeal was correct, and we dismiss this appeal with costs and interest.

The 9th June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges*.

Resumed Lakheraj lands — Suit against dependant talookdar for confirmation of possession and injunction against Waste.

Case No. 1858 of 1863.

Special Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 24th March 1863, affirming a decision passed by Baboo Ram Yad Lal, Moonsiff of Butwarah, dated the 13th November 1862.

Mugnee Ram Chowdhry and others (Defendants) *Appellants*,

versus

Baboo Gunesh Dutt Singh (Plaintiff) *Respondent*.

Baboo Cally Prosunno Dutt for Appellants.

Messrs. G. C. Paul and *J.* Baptist and *Moonshee Ameer Ali* for Respondent.

A zemindar cannot sue a dependant talookdar (the possessor of resumed lakheraj lands) for confirmation of possession and for an injunction to prevent him from committing waste. The only possession that a zemindar can obtain after a decree for resumption is a constructive one derived from the receipt of rent from the tenant. The digging of a well by the talookdar is not an act of waste requiring a perpetual injunction.

Trevor, J.—PLAINTIFF in this case sued as zemindar for a confirmation of his possession over 4 beeghas of land, and for an injunction on the defendant restraining him, a tenant

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of the plaintiff, from digging a tank without the permission of the zemindar. The plaintiff alleged that the 4 beeghas in suit is a portion of 91 beeghas which were resumed in 1831; that, by this resumption, his title as zemindar was clearly established.

The defendant pleaded that, of the land claimed by him, beegha 1-10-10 was held by him as mafee, beegha 1-5-10 as enam, and that beegha 1-4 belonged to Gowree Dutt, as his mouroosee jote under the plaintiff.

Both the Lower Courts seemed to consider the suit as one of resumption, and after an enquiry of that nature, decreed the plaintiff's claim.

Defendant now appeals specially, urging that the Lower Courts have quite misunderstood the nature of the present suit; but, before entering upon that question, the point which seemed to the Court to require determination was this, *viz.*—Is plaintiff's present suit tenable or not? The plaintiff represents himself as zemindar over the defendant, by virtue of a resumption proceeding instituted by him under Section 30 of Regulation II of 1819 and passed in 1832. The resumption, at his instance, of the lands covered by the present suit, constitutes him the zemindar of it. It is not alleged that that resumption decree has ever been carried out by the collection of rents. But even admitting for argument's sake that it was, it is clear according to the plaintiff's statement that the defendant, the possessor of the resumed lakheraj land, is, as regards the plaintiff, in the light of a dependant talookdar (Regulation XIX of 1793 Section 6), that is, of a person holding a tenure intermediate between ryots and the zemindar, in which he has a beneficial interest which is transferable by sale or otherwise. Such being the status of the parties, according to plaintiff's allegation, the question remains. Can the zemindar sue for confirmation of possession and an injunction to prevent his under-tenant from committing waste? We are clearly of opinion that he cannot. The only possession that the plaintiff can obtain after a decree of resumption, is the constructive one derived from the receipt of rent from his tenant. That step he has never taken, and, therefore, a confirmation of possession merely on paper is out of the question. As to the demand for an injunction, we are of opinion that a talookdar intermediate between the ryot and the zemindar, has full power to dig tanks in his tenure in which he holds a beneficial interest; that, consequently, that act is not one of waste requiring a perpetual injunction. At the same time, when assessing the dependant talookdar, the zemindar can assess the land covered by the tank, so as to suffer no loss from the act of his tenant. This order has no reference to Gowree Dutt's lands, upon which, it is admitted, the execution has not actually been made. Under this view we reverse the decrees of the Courts below, decreeing the special appeal; and under the peculiar circumstances of this case, we declare each party liable to pay his own costs in all the Courts.

The 9th June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Power of Jumma-nuvis to grant Hookoomnamah.

Case No. 1814 of 1863.

Special Appeal from a decision passed by Mr. James Reily, Principal Sudder Ameen of Dinagepore, dated the 24th March 1863, *reversing a decision passed by Baboo Mudun Gopal Shome, Moonsiff of Gungarampore, dated the 17th April* 1862.

Hur Gobind Kote and others (Defendants) *Appellants,*

versus

Japra Haree (Plaintiff) *Respondent.*

Baboo Prosunno Coomar Sein for Appellants.

Mr. A. F. Lingham for Respondent.

A ryot is not competent to contest the authority of a jumma-nuvis to grant a hookoomnamah, when the zemindar (though made a defendant to the suit) does not appear and challenge the authority of the jumma-nuvis.

Trevor, J.—The plaintiff in this case sued upon a hookoomnamah which had been given to him by the jumma-nuvis of the zemindar, for possession of a certain fishery upon which he had incurred some small expense, of which he had been dispossessed by defendants.

The defendants pleaded that they were in possession under a pottah granted to them by the zemindar's gomashtah; that the plaintiff's grantor had no authority to grant the hookoomnamah to him; and that the hookoomnamah itself was an invalid document, not being drawn up in the form prescribed by Section 2 of Act X of 1859.

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The first Court found plaintiff's document of title, his possession, and dispossession not proved; and he found also that the instrument propounded by the defendants was genuine. He, therefore, dismissed the plaintiff's claim.

The Principal Sudder Ameen reversed the decision of the first Court, finding plaintiff's hookoomnamah genuine, his possession under it and dispossession by defendants under an alleged lease, granted by a Mundul of the village in which the fishery was situated, proved.

Defendants now appeal especially, urging that the jumma-nuvis had not power to grant a hookoomnamah, so that, even on the finding of the Principal Sudder Ameen, plaintiff's suit should be dismissed.

Plaintiff made the zemindar a defendant. The zemindar did not appear and challenge the authority of the jumma-nuvis. When, therefore, the Lower Court finds plaintiff's document genuine, we do not think it competent to a mere ryot like the defendant, to contest the authority of a party whose power the zemindar has not contested. We, therefore, dismiss this special appeal with costs.

The 9th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Hindoo Law—Sale of Ancestral property for debts of ancestor.

Case No. 2859 of 1863.

Special Appeal from a decision passed by Mr. R. Thompson, Officiating Judge of Nuddea, dated the 14th August 1863, affirming a decision passed by Baboo Nobin Kishen Palit, Principal Sudder Ameen of Meherpore, dated the 8th September 1862.

Gunga Narain Paul (Plaintiff) *Appellant,*

versus

Umesh Chunder Bose and others (Defendants) *Respondents.*

Mr. W. A. Montriou and *Baboo Prosunno Coomar Sein* for Appellant.

Baboos Kally Prosunno Dutt and *Doorga Doss Dutt* for Respondents.

According to Hindoo Law, a man's property is liable for his debts, and property descends to an heir burdened with the debts of the ancestor, which must all be satisfied before the heir can be said to have any interest in the property at all.

Where a decree was obtained against an heir for a debt of the ancestor, but before the property was sold in execution of such decree, the property was attached and sold in execution of a second decree for a personal debt of the heir,—HELD that the prior sale in execution of the second decree could give the purchaser no preferential right in the property over the subsequent purchaser in execution of the first decree.

Loch, J.—ONE Choonee Lal died indebted. Previous to his death, a suit had been brought against him to recover the amount of a bond, and the decree passed against Monee Lal, nephew of the deceased, who, claiming under a will, had taken possession of the deceased's property, and obtained a certificate to administer to the estate. Execution was taken out, and Mouzah Chittra, the property in dispute, was attached by the judgment-creditor in Srabun 1268. In the course of the same year, another suit by a different party was instituted against Monee Lal and his two brothers for a personal debt, and a decree obtained. Execution was taken out, and the same village attached in Aghran 1268, and the rights and interests of the judgment-debtors sold in Magh of the same year; subsequently, the property was sold in Chyet 1268 in execution of the first mentioned decree.

The contest now is between the auction purchasers. Plaintiff alleges that he stands in the shoes of Choonee Lal to whom the property originally belonged, and for whose debts it was liable, and against whom, as re-represented by Monee Lal, decree was executed and the property attached; that the estate of Choonee Lal is primarily liable for his debts, and as the attachment under which the property was sold and purchased by the plaintiff, it cannot be superseded by a subsequent attachment made by another party in a decree for a personal debt of Monee Lal.

The defendant urges that, though the other execution was first in time, the sale under which he purchased took place first, and, therefore, when the second sale was made,

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there was nothing to sell: and under the provisions of Section 170 Act VIII of 1859, a second attachment is clearly contemplated, and the doctrine of *caveat emptor* must be applied to the plaintiff's purchase.

The Lower Courts have dismissed the suit, the Judge considering that plaintiff failed to use due diligence in bringing the property to sale.

By Hindoo Law a man's property is liable for his debts, and property descends to an heir burdened with the debts of the ancestor, which must all be satisfied before the heir can be said to have any interest in the property at all. Both decrees referred to in this case were given against Monee Lal, but with this essential difference, that in the first, under which plaintiff purchased, Monee Lal was the representative of his uncle, Choonee Lal, and the property was sold for the debt of Choonee Lal, for which it was legally liable, and which liability it was necessary to satisfy before any right in the property accrued to Monee Lal. The second decree was for the personal debt of Monee Lal, and the rights and interests of Monee Lal in the property were sold to satisfy that debt. But his rights and interests amounted to nothing, so long as the debt of Choonee Lal remained unsatisfied, and in purchasing the rights and interest of Monee Lal, the defendant purchased nothing but a bag of wind. No doubt he might, at the time of the second sale, have paid Choonee Lal's debt; but failing to do so, the fact of his sale being prior in time, cannot give him a preferential right to the property, or enable him to keep out the plaintiff auction-purchaser, who has really purchased the rights and interests of Choonee Lal, for whose debt the property was primarily liable. Under this view of the case, we reverse the decision of the Lower Court, and give a decree for the plaintiff with all costs.

The 9th June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Sale for arrears of Revenue—Limitation—Title of auction-purchaser.

Case No. 1861 of 1863.

Special Appeal from a decision passed by the Principal Sudder Amcen of Purneah, dated the 22nd April 1863, reversing a decision passed by the Moonsiff of that District, dated the 22nd December 1862.

Baboo Dheput Sing (Plaintiff) *Appellant,*

versus

Mothooranath Jah (Defendant) *Respondent.*

Mr. H. Stainforth and *Baboos Romanath Bose* and *Bunsee Buddun Mitter* for Appellant.

Mr. J. Baptist for Respondent.

The title of an auction-purchaser at a sale for arrears of revenue accrues not from the date of sale, but from the date on which the sale was confirmed and certificate granted under Section 20 Act I of 1845.

Campbell, J.—The question in this case is whether the title of an auction-purchaser at a sale for arrears of revenue accrued from the day of sale or from the day on which the sale was confirmed and certificate granted under Section 20 Act I of 1845; and thence, whether the right to sue for resumption under Clause 14 Section 1 of Act XIV of 1859 extends to 12 years from the former or from the latter date.

We think that, as the purchaser can exercise no rights of ownership under his purchase, nor protect himself against alienation or waste till he receives the certificate, his title must be considered to accrue from that date only. In that view this suit is within time, and we remand it to the Lower Appellate Court to be tried on the merits.

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The 9th June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Mokururee Ryot (Rights of).

Case No. 1862 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 15th May 1863, affirming a decision passed by the Moonsiff of that District, dated the 26th February 1863.

Baboo Dheput Sing (Plaintiff) *Appellant,*

versus

Halal Khoory Chowdhry (Defendant) *Respondent.*

Baboo Bungsee Buddun Mitter for Appellant.

Mr. A. F. Lingham and *Baboo Kally Kissen Sein* for Respondent.

A mokururee ryot may build a well on his land or do anything that does not so entirely destroy the land as to endanger the zemindar's ground-rent.

Campbell, J.—THE special appellant, the zemindar, seeks to restrain the defendant a ryot from building a well on his land. The defendant has a transferable tenure purchased at auction, and it is even found to be a mokururee holding. Under such circumstances we are clearly of opinion that the plaintiff can have no ground for restraining the defendant from building a well at his pleasure, or doing anything which does not so entirely destroy the land as to endanger plaintiff's ground-rent. We therefore dismiss the appeal with costs.

The 10th June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Sale in execution—Limitation—Title of auction-purchaser.

Case No. 1869 of 1863.

Special Appeal from a decision passed by Moulvee Mahomed Nazim Khan, Principal Sudder Ameen of Mymensingh, dated the 1st April 1863, affirming a decision passed by Baboo Gour Chunder Dass, Moonsiff of Atteah, dated the 27th August 1862.

Kalee Dass Neogee (Plaintiff) *Appellant,*

versus

Hur Nath Roy Chowdhry and others (Defendants) *Respondents.*

Baboos Romesh Chunder Mitter and *Sreenath Dass* for Appellant.

Baboos Hem Chunder Banerjee, Dwarkanath Mitter, and *Dwarkanath Mookerjee* for Respondents.

The title of an auction-purchaser at a sale in execution of a decree accrues from the date of sale, and not from the date on which he may obtain his sale certificate.

Trevor, J.—PLAINTIFF sued for possession of certain land which he purchased in execution of a decree.

The defendant pleaded that plaintiff's suit was barred by limitation, more than 12 years having elapsed from the date of sale.

The Lower Courts both dismissed plaintiff's claim, he being out of Court under the Statute of Limitation.

Plaintiff now appeals specially, urging that the 12 years count only from the date on which he actually got the certificate of sale, which will bring him within the Statute.

It does not appear that there was any appeal from the sale, or that any transaction took place rendering plaintiff's title under the sale in any way uncertain. He simply contends that, as he obtained his sale certificate two years after the sale, limitation will only run from that date. This argument, however, is futile. His title accrued on the date of sale, and his negligence in procuring his document of title from the Court, can in no way prevent limitation running against him, his title being otherwise complete. We reject the special appeal with costs.

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The 10th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Limitation—Suit to recover property comprised in an Act IV order.

Case No. 16 of 1864.

Regular Appeal from a decision passed by Baboo Tarakant Biddyasaugur, Principal Sudder Ameen of Jessore, dated the 13th October 1863.

Rajah Indoo Bhoosun Deb Roy (Plaintiff) *Appellant,*

versus

Hurro Nath Roy and others (Defendants) *Respondents.*

Suit laid at rupees 5,200.

Baboo Unnoda Persad Banerjee for Appellant.

Baboo Sreenath Doss for Respondents.

Suit to recover property comprised in an Act IV order, which, by an apparently fraudulent under-valuation, was instituted in a wrong Court before Act XIV of 1859 came into operation. The under-valuation having been brought to notice, the plaint was returned to the plaintiff who filed it in the proper Court after that Act came into operation. HELD that the case was governed by the limitation prescribed by Clause 7 Section 1 of that Act.

Loch, J.—THIS is a suit to recover possession of Mouzahs Gobindpore and Shairpore, which plaintiff states were included at the Permanent Settlement in his estate No. 170, Gird Poorub ; that in 1245, corresponding with 1838, the defendants who are the proprietors of the estate known as Gird Puchim, ousted the plaintiff who was then a minor ; that, subsequently, disputes for possession arose, and an award, adverse to the plaintiff, under Act IV of 1840, was passed in March 1853, which was affirmed in appeal on 17th May 1853. Plaintiff obtained his majority in 1261 or 1854, and brought the present suit on 15th May 1862.

A preliminary objection is taken to the suit that plaintiff is out of time under the Law of Limitation, Act XIV of 1859.

It appears that plaintiff instituted a suit for this property in the Sudder Ameen's Court on 31st December 1861, and valued the suit at rupees 800. As there was nothing in the face of the plaint to show that the suit had been under-valued, the case was admitted to the file, and notice served on the defendant as usual. The defendant immediately attacked the suit on the point of under-valuation, and the plaintiff at once raised it to above rupees 5,000, on which the Sudder Ameen, on 14th May 1862, returned the plaint to the plaintiff, under the provisions of Section 30 Act VIII of 1859, as the suit was beyond his jurisdiction, and directed him to file it in the proper Court, and he filed it next day in the Court of the Principal Sudder Ameen.

We think that plaintiff must be considered to have filed this suit after Act XIV of 1859 came into operation, and he must take the consequences of his apparently fraudulent under-valuation of the suit when he instituted it in the Court of the Principal Sudder Ameen. Plaintiff will, therefore, be liable to the rules laid down in that law. Now, Clause 7 Section 1 of Act XIV. 1859, prescribes the period of three years from the date of the final order in the case, as that in which a suit may be brought in the Civil Court to contest an award under Act IV. 1840 ; but, under the provisions of Section 18, it was enacted that all suits that shall be instituted within the period of two years from the date of the passing of the Act, shall be tried and determined as if this Act had not passed ; but all suits brought after the expiration of the said period shall be governed by this Act and no other Law of Limitation. The plaintiff's cause of action arose on 17th May 1853, when the final award in the Act IV case was given against him. He attained his majority in 1854. The Law of Limitation, Act XIV of 1859, was passed on 5th May 1859, and time was given him till two years after passing of the Act, *i. e.* to 5th May 1861, to file his suit. This he failed to do. As the operation of Act XIV was suspended till the commencement of January 1862, the plaintiff, had he brought his action before that period, would have been in time under the old Law of Limit-

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ation; but having filed his plaint subsequent to that law coming into force, he must be held to be subject to its provisions. Having failed to file his plaint within two years from the passing of the Act, the provisions of the Act as laid down in the latter part of Section 18, must be held applicable to his case, and by Clause 7 Section 1 he was bound to bring his suit within three years from the date of the final award, or, in his case, from the date of his attaining majority. He has allowed more than nine years to elapse, and is, consequently, out of Court. We consider the suit to be barred by limitation, and dismiss the appeal with costs.

The 10th June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Sale—Re-sale—Specific performance.

Case No. 1891 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 7th April 1863, *modifying a decision of the Sudder Ameen of that District, dated the 26th July* 1862.

Muthur Ali and others (Defendants) *Appellants,*

versus

Sheo Sahoy Sing and others (Plaintiffs) *Respondents.*

Baboo Dwarkanath Banerjee for Appellants.

Baboo Kallee Kissen Sein for Respondents.

Where the purchaser of an estate paid earnest-money, and no time was fixed for the payment of the balance, and the vendor re-sold the property within a week,—HELD that the vendor was bound to have waited a reasonable period, that the second purchaser took nothing, and that the first purchaser was entitled to a decree for specific performance.

Campbell, J.—PLAINTIFF purchased a property, paid earnest-money, and deed of transfer was executed and registered, but not delivered, it being stipulated that the purchaser should pay the balance and then get the deed—time for payment not stipulated. Under such circumstances we can have no doubt that defendant, special appellant, was bound to wait a reasonable time for payment, and that, as he re-sold the property within a week, the second purchaser took nothing. Plaintiff is entitled to a decree for specific performance, and we dismiss the appeal with costs.

The 18th June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Demurrer.

Case No. 1886 of 1863.

Special Appeal from a decision passed by Moulvie Mahomed Nazim Khan, Principal Sudder Ameen of Mymensing, dated the 9th April 1863, *reversing a decision passed by Baboo Gour Chunder Dass, Moonsiff of Attea, dated the* 18*th September* 1862.

Kishen Mohun Neogee and others (Plaintiffs) *Appellants,*

versus

Kalee Dass Neogee and others (Defendants) *Respondents.*

Baboos Onookool Chunder Mookerjee and *Opprokash Chunder Mookerjee* for Appellants.

Baboos Sreenath Doss and *Mohendro Lall Shome* for Respondents.

Where parties themselves do not demur to an action, it may be presumed that there is no ground for one, and it is not for the Court to raise or determine on grounds not appearing in the statement of the parties before it.

Trevor, J.—PLAINTIFF Kishen Mohun Neogee sued two defendants, Kalee Dass

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and Huro Soonduree, for possession of certain lands as appertaining to his talook No. 234.

The defendant Kalee Dass pleaded that the lands now in his possession, forming plot 1, formed portion of a suit decided adversely to plaintiff, in which he, defendant, and plaintiff were the opposing parties, and consequently that the suit as to it is barred, the matter being a *res judicata*; and that that plot is a part of his estate No. 279. And defendant Huro Soonduree (who, it appears, is the wife of Kalee Dass) pleads that lot No. 2 is a portion of her estate No. 234.

The Moonsiff determined that the suit, as far as regarded plot 1, was barred by reason of a previous adjudication regarding it in a suit between the same parties. He gave plaintiff, however, a decree for the land covered by plot 2.

The Principal Sudder Ameen, on appeal, determined that the whole suit was, as between the parties, a *res judicata*, and he dismissed the plaintiff's suit.

Plaintiff now appeals specially, urging that, as Huro Soonduree herself did not demur to the action on the ground of its being, as to plot No. 2, a *res judicata*, but pleads to the merits of the case, and as there was nothing in the plaintiff's plea from which the same was self-evident, it was not competent to the Principal Sudder Ameen to take up the plea of his own mere motion and to decide the case on it.

We think that the contention of the special appellant is sound, and that when parties themselves do not demur to an action, it may be presumed there is no ground for one, and it is not for the Court to raise or determine on grounds not appearing in the statements of the parties before him. We, therefore, reverse the decision of the Principal Sudder Ameen as to plot 2, and direct him to enquire into the title of the parties before him, the only issue legitimately arising on the statement before him. The case is remitted to the Principal Sudder Ameen accordingly.

The 18th June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Estoppel—False statement in plaint as to possession.

Case No. 1898 of 1863.

Special Appeal from a decision passed by Mr. W. M. Beaufort, Judge of Behar, dated the 14th April 1863, affirming a decision passed by Moonshee Nazeerooddeen Mahomed, Principal Sudder Ameen of that District, dated the 25th September 1861.

Choonee Lal (one of the Defendants) *Appellant,*

versus

Shaikh Keramut Ali and others (Plaintiffs) *Respondents.*

Mr. T. T. Forbes for Appellant.

Moulvie Syud Murhumut Hossein for Respondents.

A plaintiff is not estopped by an evidently false statement in his plaint as to possession; but the Court may look behind the statement and determine upon its truth or otherwise, and affirm or disallow it as may seem right and proper.

Trevor, J.—PLAINTIFFS in this case sue for recovery of the amount paid to Choonee Lal, with interest, for the sub-lease of a ¼th share of certain villages of which he was the lessee, of which they have been unable to obtain possession.

The defendant Choonee Lal answers to the effect that plaintiffs had acquired possession from him, and are, therefore, not entitled to that which they now claim.

Certain parties, the superior holders of Choonee Lal, appear objecting that Choonee Lal himself never obtained possession; he consequently cannot give possession to a third party.

The Lower Courts gave plaintiffs a decree.

Defendant now appeals specially. His main grounds are: 1*st*, that, as plaintiffs have in petition presented by them admitted possession, they are not at liberty now to successfully plead non-possession, but are estopped by their previous statement; 2*nd*, that in a suit between the plaintiffs and the defendant, the only point in issue

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is whether plaintiffs ever obtained possession, and the determination by the Court that Choonee Lal never obtained possession is a point in dispute between Choonee Lal and the intervenor, Dulee Sing, and not between plaintiffs and defendant, and, therefore, should not have been noticed in the present case.

There can be no doubt that there are certain fraudulent acts which, when perfected, even though done with the intention of deceiving third parties, cannot be gainsaid by the parties between themselves. Of such a character is a transfer of land perfected by deed and possession. In such a case, if the nominal transferee afterwards, relying on the deed in his name and possession in his favor, turn round upon the party transferring the property nominally, and claim it as his own, the transferee is bound by the fraudulent acts to which he was a party. But the present case is not of that high nature. Here, certain statements in petition have been made by the parties before us as to possession, which are evidently false, and we are required to hold them estopped by those statements. We do not think that they should be so held. In such a case the Courts may look behind those statements, and having so done, may determine upon their truth or otherwise, and affirm or disallow them as seems right and proper.

On the second point taken by special appellant, we would remark the point of Choonee Lal's not having obtained possession, was first taken up by the plaintiff. It is certainly beyond the issue requisite for the determination of the present contention between the main parties to the present suit. and, of course, will be in no way prejudicial to either of the defendants, should it ever arise in a suit brought by them against each other.

The special appeal is dismissed with costs.

The 18th June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Arbitration.

Case No. 1866 of 1863.

Special Appeal from a decision passed by Pundit Sreenath Biddiabagish, Principal Sudder Ameen of East Burdwan, dated the 15th April 1863, affirming a decision of Baboo Gopeenath Moitro, Moonsiff of Khundghose, dated the 4th December 1861.

Ramdhone Sircar (Defendant) *Appellant,*

versus

Seetanath Sircar (Plaintiff) *Respondent.*

Baboos Baneenath Bose and *Romanath Bose* for Appellant.

Baboos Doorga Doss Dutt and *Kally Prosunno Dutt* for Respondent.

Under the old law previous to Act VIII of 1859, the summary refusal to enforce an arbitration award did not bar the use of the award as the basis of a regular suit.

A mere agreement to refer to arbitration, if it contained no acknowledgment of the plaintiff's right or possession, did not save limitation; but the time during which the case was before the arbitrators and the plaintiff was trying in another form to enforce the award, may be deducted from the period of limitation.

Campbell, J.—PLAINTIFF claims certain property as his by hereditary right, and asserts that the defendant and he agreed to refer the matter to arbitrators, who decided in his favor.

Under the old law previous to Act VIII of 1859, he applied to the Principal Sudder Ameen to enforce the arbitration award. But that Officer, not being satisfied regarding the regularity of the arbitration, refused to do so, and referred him to a regular suit, which latter is the subject of the present special appeal. Plaintiff gave evidence both of his right and of the agreement to refer and consequent arbitration. The first Court decided in his favor. The Lower Appellate Court also decided in plaintiff's favor, apparently treating the evidence to the arbitration rather as evidence towards the main issue of right than as a separate issue, and deciding on general grounds of right.

The defendant specially appeals. He urges that the arbitration award having been already rejected in a previous suit, cannot be made the subject of another suit. But we consider that, as the old law (in this differing from the present law) treated the enforcement of an award as a mere summary proceeding, the summary rejection does not bar the use of the award as the basis of a regular suit.

Secondly, he urges that, if the decision be considered to be a decision of right on the

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merits, then the Lower Appellate Court was bound to decide on his plea of limitation, which it has omitted to do. For respondent it is argued (as did the Moonsiff) that the agreement to refer to arbitration (which is certainly genuine) saved the limitation. But we find that this document contains no acknowledgment of plaintiff's right or possession. Therefore, it does not give a new term of limitation. The most that can be said is, that the time during which the case was before the arbitrators and the plaintiff was trying in another form to enforce the arbitration award, may be deducted from the time which runs for limitation. Whether the case will then come within the term of limitation, we have not the means of determining.

We therefore remand the case to the Lower Appellate Court, with the direction that it will keep separate the question of the binding nature of the arbitration award (upon which apparently plaintiff primarily brought his suit) from that of right independent of the award. If the reference and award be legally binding on the parties, then the question of limitation will not arise; but the decree must be distinctly put on that ground. If, on the other hand, the arbitration award is not binding, and plaintiff must fall back on his original right, then the plea of limitation must be determined before there can be a decree on proof of title alone.

The 18th June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Surety (Liability of)—Voluntary payments.

Case No. 1840 of 1863.

Special Appeal from a decision passed by Mr. A. Hope, Officiating Judge of Hooghly, dated the 31st March 1863, affirming a decision passed by Mr. A. Davidson, Second Principal Sudder Ameen of that District, dated the 6th May 1862.

Khetter Nath Seal and another (Defendants) *Appellants,*

versus

Shib Nath Chatterjee (Plaintiff) *Respondent.*

The Advocate-General and *Baboo Boykuntnath Paul* for Appellants.

Baboos Banee Madhub Banerjee and *Onookool Chunder Mookerjee* for Respondent.

The liability of a surety will not extend beyond the precise limits of his undertaking: he is not liable for any sum voluntarily paid by his principal to a third party for any purpose of his own.

Trevor, J.—THE plaintiff in this case is the Treasurer of the Hooghly Collectorate, and he sues two poddars employed under him and their sureties, for a deficiency amounting altogether to 1,132 rupees, *viz.*, 934 rupees on account of cash deficient on 1st April 1857, and 198 rupees on account of short weight in the bags on the 7th April with interest.

The poddars plead that the deficiency of 934 rupees was re-placed by them with the exception of 14 rupees, which sum, though first paid by plaintiff, they afterwards repaid to him; and that they are only answerable until monies are tied up in bags and placed in the cash chest, and that then the bags were not short in weight; that, consequently, they are not liable. Their sureties plead that they were only liable for sums misappropriated by their principals, and as plaintiff does not set forth any such misappropriation, he has no valid claim against them.

The Lower Courts gave plaintiff a decree, the Judge finding that there was a certain sum deficient in the poddar's account; but that this sum they made good by their paying in a sum of money which they had received from one Nundolall Boral on another account; that the plaintiff was compelled to pay this sum again to Nundolall Boral to enable that person again to pay the amount intercepted by the poddars into the treasury; and that this payment gives him a claim against the sureties of the poddars, by whose tortuous act the payment became necessary.

Against this decision a special appeal is now preferred by the sureties, and it is contended on their behalf that the payment made by the plaintiff to Nundolall was a voluntary payment, and consequently they could not be liable for the same; that, moreover, the contract of suretyship is *strictissimi juris*, and the liability of a surety will not extend beyond the precise limits of his undertaking; that they only became liable for any sum misappropriated in the course of their business by the poddars; that, as such misappropriation in the Government money allowedly did not exist, they are not liable for any sum which plaintiff may have paid voluntarily to any third party for any purpose of his own.

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There is no doubt that, as contended by the special appellant, the liability of a surety cannot be extended beyond the precise limit of his undertaking. The question, then, before us, is simply whether the present claim falls within that liability or not, on the facts found by the Lower Appellate Court. We are of opinion that it does not, and by the course of conduct which the plaintiff has thought fit to adopt, for reasons of his own, in the present transaction, he has no claim against the sureties. The deficiency and the mode in which it had been met by the poddars having come to the knowledge of the treasurer, he should have at once tendered the sum to the Collector under explanation, and not to have paid the amount to Nundolall with whom he had no privity, and whom he was in no way bound to pay. The payment made by the plaintiff to Nundolall we consider under the circumstances a voluntary payment, and one which, under the deed of suretyship, gave him no right of action against them. We reverse the judgment of the Lower Court, and decree the special appeal with costs.

The 18th June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Pre-emption—Mortgage—Limitation.

Case No. 1899 of 1863.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 11th April 1863, affirming a decision of Mr. S. DuCosta, Sudder Ameen of that District, dated the 28th November 1862.

Mussamut Jankee Kooer and others (Defendants) *Appellants,*

versus

Mussamut Lekranee Kooer (Plaintiff) *Respondent.*

Mr. J. Baptist and *Baboo Hurry Koomar Sein* for Appellants.

Baboos Chunder Madhub Ghose, Mohesh Chunder Chowdhry, and *Onookool Chunder Mookerjee* for Respondent.

Though the law allows a pre-emptor to sue any time within one year of the transfer of possession, there is nothing to prevent his doing earlier. The absolute right of a mortgagee and consequent right to claim pre-emption arise from the time when the sale became absolute.

Campbell, J.—THIS was a suit to establish a right of pre-emption by a partner and to obtain possession. It was brought on foreclosure of a mortgage by the usual notice and the expiry of the year of grace.

Special appellant (defendant) contends that, as the mortgagee has not taken possession under his foreclosure, and the limitation law gives, for purposes of a suit for pre-emption, one year from date of transfer of possession, the suit is premature and cannot be brought till possession has been transferred. But we think that, though the law permits the pre-emptor to sue any time within one year of the transfer of possession, there is nothing to prevent his doing so earlier. The absolute right of the mortgagee and consequent right to claim pre-emption arise from the time when the sale becomes absolute. We therefore dismiss the special appeal with costs.

The 18th June 1864.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Mortgage—Foreclosure.

Case No. 2213 of 1863.

Special Appeal from a decision passed by the Additional Judge of Sarun, dated the 13th May 1863, affirming a decision of the Principal Sudder Ameen of that District, dated the 24th April 1862.

Hunoomanpersaud Sahoo and others (Defendants) *Appellants,*

versus

Kaleepersaud Sahoo (Plaintiff) *Respondent.*

Mr. A. F. Lingham for Appellants.

Baboos Romesh Chunder Mitter, Neelmadhub Sein, and *Hem Chunder Banerjee* for Respondent.

Two persons jointly held a mortgage, each having an equal share in it. The equity of redemption having subsequently become vested solely in one of these persons;—HELD that, under the circumstances, a notice of foreclosure confined to a one-half share only of the mortgage (issued by the mortgagee who had no interest in the equity of redemption) was sufficient, and then the foreclosure proceedings were not bad, although they related only to a part and not to the whole of the mortgaged property.

Macpherson, J.—ONE Uchalall, now deceased, executed a mortgage by conditional sale to Gungadyal Sahoo (also now deceased) of a four annas share in certain lands. Gungadyal died leaving the plaintiff, Kalee-

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persaud, and the defendant, Hunoomanpersaud, his heirs and representatives. Uchalall died leaving the female defendant as his representative. In the year 1847, long subsequent to the date of the mortgage, the right, title, and interest of Uchalall in the mortgaged lands were sold in execution of a decree obtained against him by a third party. At that sale Hunoomanpersaud was the purchaser, and he then got, and has ever since remained in, possession of the lands in question. The result of these occurrences was that, whereas Kaleepersaud and Hunoomanpersaud jointly held the mortgage over the 4 annas share which had been Uchalall's, Hunoomanpersaud alone occupied the place of Uchalall and alone had the right of redemption of the mortgaged property.

In 1849 Kaleepersaud issued notice of foreclosure of a 2 annas share of the estate of which the 4 annas share had been mortgaged by Uchalall, and he served the notice on Hunoomanpersaud and on the female defendant, although the latter had no longer any substantial interest in the matter. Almost 12 years from the end of the year of grace, and only just in time to save himself from being barred by the old Limitation Law, Kaleepersaud instituted the present suit for possession, as on foreclosure of a 2 annas share of the estate of which the 4 annas share had been mortgaged by Uchalall. The plaintiff was successful in both the Lower Courts, and the defendant Hunoomanpersaud now appeals specially, and seeks to have the decree which has been passed reversed on two grounds.

These grounds are :—

1.—That the mortgage being a mortgage of a 4 annas share of an estate, a suit for foreclosure will not lie for anything less than the whole 4 annas share, and consequently the notice of foreclosure as to a 2 annas share is of no effect, and this suit for a 2 annas share cannot be sustained ; and

2.—That there is no evidence of the service of the notice of foreclosure.

As regards the last point, we think that the service is sufficiently established. The usual returns by the serving officer, duly certified, have been put in, and this appears to be under the circumstances enough (*see* the remarks of the late Sudder Court in giving judgment in a case which will be found at p. 281 of the Reports for 1854). The returns are signed or certified by the Judge of the Court from which the notice issued ; and such returns so certified are at the least as likely to be reliable evidence of service as the statement of the serving officer could have been if he had appeared in Court and had in person spoken to what occurred in the service of the notice more than twelve years previously. It is to be further remarked that it is clear that Hunoomanpersaud was, and necessarily must have been, in fact, well aware of the issue of the notice ; and although this is in itself not enough, it still is of some weight when the question of the service of the notice has to be established so long after it took place.

The other objection is one of some difficulty. But inasmuch as the defendant Hunoomanpersaud can in no possible manner be a sufferer from the form in which the plaintiff has shaped his proceedings, we do not think that he is entitled to have the decree of the Lower Court set aside. The plaintiff and the defendant Hunoomanpersaud alone represent the mortgagee ; and Hunoomanpersaud alone represents the mortgagor. If the notice had been issued as to the 4 annas share, and if this suit had been instituted as to the 4 annas share, the plaintiff would have been obliged in his plaint to shew that in fact he was entitled only to 2 annas, and that he sought possession of only a 2 annas share. There is no doubt that, as an ordinary rule, a foreclosure suit must be a suit applicable to the whole property mortgaged, and a mortgagor is not to be held liable to a variety of suits and proceedings in respect of the different interests which the mortgagees may, as between themselves, possess. But here the principles upon which that rule is based have no application ; for there is no reason why the rights of all parties under the mortgage might not be fully and finally dealt with in a suit framed as this suit has been framed. The decree in this suit concludes the whole matter : and the defendants cannot be further vexed in respect of the mortgage. Hunoomanpersaud is in no way prejudiced by Kaleepersaud's at once limiting his claim to a 2 annas share ; indeed as Hunoomanpersaud held the equity of redemption over the whole 4 annas, and had at the same time the right of foreclosure over 2 annas as heir of the original mortgagee, there was nothing left that Kaleepersaud, the other heir, could sue for but the remaining 2 annas, and all the equities are on his side. We think, therefore, that, under the circumstances, this suit was rightly brought ; and the appeal is therefore dismissed with costs.

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The 18th June 1864.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Review of Predecessor's Judgment.

Case No. 3056 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 27th of July 1863, *reversing a decision of the Moonsiff of that District, dated the 17th April* 1861.

Gossie Doss and others (Plaintiffs) *Appellants,*

versus

Narain Doss (Defendant) *Respondent.*

Baboo Roopnath Banerjee for Appellants.

Baboos Hem Chunder Banerjee and *Nil Madhub Banerjee* for Respondent.

A Lower Court acts without jurisdiction if it admits a review of its predecessor's judgment, unless either the pary apply for review within 90 days, or the Court is satisfied that there is just and reasonable cause for not having preferred the application within the limited period.

Campbell, J.—THIS is a case in which we think that the Principal Sudder Ameen has acted most illegally, and grossly abused his powers; but in which, if the illegality had been one degree less glaring, we might have been precluded from interfering by the terms of the law.

It appears that the case had been decided by the former Principal Sudder Ameen in favor of plaintiffs, the present special appellants, confirming the decision of the Court of first instance. Fifteen months after, the defendants applied to the new Principal Sudder Ameen, Baboo Hurro Chunder Chatterjee, who, without giving any reason whatever for accepting an application for review after the prescribed period of 90 days, took it up, and reversed the decision of the former Principal Sudder Ameen.

It does not appear that there was a scrap of new evidence or matter such as would justify a review. The Principal Sudder Ameen simply re-heard the case, and went over the record as if he had been a Court of Appeal from his predecessor's judgment, and, forming an opinion different from that of his predecessor, reversed his decision.

The vague expression of the law "for any other good or sufficient reason," and the provision that there shall be no appeal from an order admitting a review, would probably have prevented our interfering if the application had been made within time, although we are clear that the law never contemplated the taking up a case in review merely because a new Judge might differ in opinion from his predecessor. But we think that in this case the Principal Sudder Ameen was absolutely without jurisdiction, unless, in the terms of Section 377, either the party applied within 90 days, or the Court was satisfied that there was just and reasonable cause for not having preferred the application within the limited period. This application was not made within 90 days; and in the absence of any finding that there was just and reasonable cause for delay, the proceedings of the Principal Sudder Ameen were, as we have said, wholly without jurisdiction. On that ground, the Court annul them and restore the decision of the former Principal Sudder Ameen. Costs of all the Courts to be paid by the respondent, the defendant in the suit.

We must express our opinion that there is great want for some provision of the law to guard against the improper admission of applications for review of the judgments of former Judicial Officers in Courts consisting of a single Judge; and we direct that copy of this judgment be sent to the Judge of the English Department for such notice of the illegal and improper conduct of this Principal Sudder Ameen, Hurro Chunder Chatterjee, as he may deem proper.

The 20th June 1864.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Putnee Lease — Khas possession — Misrepresentation.

Case No. 571 of 1863.

Regular Appeal from a decision passed by Baboo Doorga Persad Ghose, Principal Sudder Ameen of Nuddea, dated the 31st August 1863.

Mokoond Chunder Roy (one of the Defendants) *Appellant,*

versus

Prankissen Paul Chowdhry (Plaintiff) *Respondent.*

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Baboos Sreenath Doss and *Kishen Succa Mookerjee* for Appellant.

Baboo Mohendro Lal Shome for Respondent.

Suit to recover the consideration-money paid by the plaintiff for a putnee lease which the plaintiff was induced to take by the fraudulent representation of the defendant that khas possession would be given to him,—HELD that the plaintiff's proper course was to repudiate the lease and bring his action as soon as he found he could not get the kind of possession which he had paid for, instead of waiting for nearly five years. There having been great delay and partial possession under the putnee, the suit was dismissed.

Macpherson, J.—IN this case the plaintiff (who is now the respondent) sued to recover back the consideration-money paid by him for a putnee lease of certain mouzahs. The plaintiff says that he paid the consideration-money and took the putnee in consequence of representations made to him fraudulently by the defendant Mokoond Chunder Roy (the appellant before us), and one Prankissen Roy, since deceased. Mokoond Chunder and the representatives of the estate of Prankissen are the substantial defendants, Prankissen's estate being represented by the defendants, Nityakallee Dabee and Hurry Dassee Dabee, who are respectively the mothers and guardians of two minors, who are the heirs of Prankissen. The misrepresentation complained of is an assurance, which it is alleged was given by Mokoond Chunder and Prankissen to the plaintiff, to the effect that, if he took the putnee, he would get khas possession under it. The plaintiff alleges that, relying on this assurance, he took the putnee and paid the consideration-money, but that he never got khas possession of any except a very inconsiderable portion of the lands comprised in the putnee. He further alleges that, at the time Mokoond Chunder and Prankissen promised him khas possession, they well knew it was impossible he could get khas possession, inasmuch as they had themselves previously given to a Mr. Maclagan an ijara of a large part of the estate comprised in the putnee, which ijara was still in force and had several years to run. The defendants deny that there ever was any misrepresentation, and that the plaintiff never was promised khas possession; and they say that, as a matter of fact, the plaintiff has had khas possession of several of the mouzahs, and might have had full beneficial, though not khas, possession of the remainder of the lands, if he had chosen to assert his rights and protect his own interests. They also pleaded that the suit was barred by lapse of time, but this issue seems to have been abandoned, at any rate it was not gone into by the Lower Court.

The decision of the Lower Court was in favor of the plaintiff, and was to the effect that Mokoond Chunder and Prankissen had been guilty of a material misrepresentation, in that they had assured the plaintiff, before the putnee was granted, that he would obtain khas possession, and the Court held "when plaintiff has been disappointed in it through the fraudulent acts of the defendants, he can never be deprived of the putnee consideration, though he had once held possession of the putnee mehal, inasmuch as he has not received possession of the kind he was promised."

The appellant Mokoond Chunder appeals from this decision, and he has urged before us the same points as were raised and disposed of in the Lower Court.

The plaint in this suit is very vague and indistinct, and it is not easy to gather from it either what the plaintiff considered to be his precise cause of action, or whether the plaintiff, at the time of instituting the suit, still had or ever had any beneficial occupation, other than khas, under the putnee. Substantially, however, the plaintiff's case is that, having taken the putnee owing to the fraudulent misrepresentation made to him, the fact of his not getting the khas possession which was promised him, of itself entitles him to get back what he paid without reference to any question as to whether he had or had not any beneficial possession, other than khas, under the lease.

Now a mere statement or assertion by Mokoond Chunder that khas possession would be given, would not necessarily amount to such a misrepresentation as would entitle the plaintiff to recover back the money paid by him. For the purposes of the plaintiff's claim, the misrepresentation must have been made with the intention of misleading the plaintiff in a material point, and the misrepresentation must also have in fact misled the plaintiff, and have been the means of inducing him to take the putnee. We are of opinion that there is no sufficient evidence of any misrepresentation such as will support the plaintiff's claim. It may have been in

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the course of the negociations stated that khas possession would be given, but there is really no evidence to show that the obtaining of khas possession was of the essence of the contract, and that it was for khas possession, and that alone, that the money was paid. The terms of the putnee lease itself rather go to show that khas possession was not of the essence of the contract, and was not, as now alleged, the basis on which the parties intended and professed to deal with each other. The lease says nothing as to the nature of the possession to be given ; and it appears to us highly improbable that the subject should have been so entirely lost sight of in preparing the lease, if it had been one which was at the time looked upon by the plaintiff as of such extreme importance.

If the plaintiff was induced by fraudulent misrepresentations to take this putnee, the proper course for him to follow was to repudiate the lease and bring his action as soon as he found he could not get the kind of possession which he had paid for. Instead of adopting that course, the plaintiff waits for nearly five years. The putnee is dated in Bysakh 1264, and this suit is instituted in Cheyt 1269. This delay on the part of the plaintiff militates strongly against him, so long as it is unexplained, and no attempt at explanation is made. But more than that, and it carries the case against the plaintiff much further than the mere delay, the plaintiff has all along had khas possession of some of the mouzahs of which he took the putnee, and now has or might have had, for all that appears to the contrary, full beneficial, although not khas, possession of the remainder as putneedar.

Under the whole circumstances of the case, considering the insufficiency of the evidence as to the misrepresentation relied on, the delay which has occurred in the institution of this suit, and the possession which has actually been enjoyed by the plaintiff under the lease, or which might have been enjoyed by him if he had chosen, we think that the plaintiff is not entitled to recover anything in this suit from the defendant, the appellant, Mokoond Chunder Roy.

The decree of the Lower Court, so far as it affects Mokoond Chunder Roy, is reversed, and his costs in both Courts will be paid by the respondents.

The 20th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Stamp Duty—Agreement (executed in Calcutta)—Pleading—Variation of Case.

Case No. 18 of 1864.

Regular Appeal from a decision passed by the Additional Principal Sudder Ameen of Hooghly, dated the 26th August 1863.

Goury Churn Mookerjee (Plaintiff) *Appellant,*

versus

Jogendronath Mookerjee (Defendant) *Respondent.*

Messrs. W. A. Montrion and *G. C. Paul*, and *Baboo Debendro Narain Bose* for Appellant.

Mr. J. L. Reid for Respondent.

Under the old Stamp Law, agreements *bonâ fide* executed in Calcutta by parties residing or carrying on business therein, and where there was no intention, at the time of execution, of pleading the documents in the Mofussil Courts, although such occasion might afterwards arise, were held to be good and binding documents.

Glover, J.—The Principal Sudder Ameen has dismissed this case on the ground that the document on which it has been brought is not stamped as required by law. The only point for us to consider is, whether the document should or not have been written on stamp paper.

We think it quite unnecessary to enter into the arguments urged before us to show, on the one hand, that the writing was not a legal contract requiring a stamp, and, on the other, that it was an agreement as defined in Regulation X of 1829, and therefore could not be pleaded unless it were stamped.

The document was executed in Calcutta. It purports to be a receipt for certain Government Promissory Notes made over at a previous time to the writer, who promises to return them, with interest, on receiving 15 days' notice. The Stamp Law at that time applicable to Calcutta, where the document was executed, was Regulation XII of 1826. It is a matter of public notoriety that, though that Regulation was passed, it was never registered by the Supreme

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Court, and never had effect in Calcutta; and as this writing was executed in Calcutta, where agreements not on stamp paper have always been held to be good and binding documents, we think it was altogether unnecessary that the document before us should have been written on stamped paper, and that it is, for the purpose of carrying on the present suit, a good and valid document as it stands.

It may be urged that, in this view of the law, the Stamp Act may be constantly evaded. But we intend our remarks to apply solely to documents executed in Calcutta *bonâ fide* by parties residing or carrying on business therein, and where there is no intention at the time of execution of pleading the documents in the Mofussil Courts, although such occasion may afterwards arise.

Taking this view of the question, it would, under ordinary circumstances, be unnecessary for us to go into the other points raised. But as the Counsel for the respondent cited a long list of precedents to show that, supposing the document filed by the appellant to be inadmissible as evidence, the Principal Sudder Ameen was justified in throwing out this claim altogether, we think it right to give an opinion on this point also.

It may at once be conceded that a party resting his case entirely on a document, which is found to be either inadmissible for some technical reason, or to have been fabricated, cannot be allowed to shift his ground and stand on a general plea.

A ryot for instance pleading a mokururee title on a pottah, will not be permitted, after his pottah is declared to be a forgery, to fall back upon his general rights as an occupying tenant; he would be rightly compelled to stand or fall by his pottah.*

None of the precedents quoted by the respondent's Counsel go farther in principle than this; but the present case is altogether different. The respondent admitted the appellant's claim in its entirety, and the only question between the parties was one of account. The agreement was put in to prove the respondent's liability, and, as he admitted this in his answer, the case could have proceeded, had the document in question been altogether thrown out of Court.

In no point of view, therefore, do we think that the Lower Court was justified in its decision in this case, and we therefore remand it for trial on its merits.

* *See* 6 W. R., (Act X) pages 57 and 70.

The 20th June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Limitation—Disqualification.

Case No. 491 of 1863.

Regular Appeal from a decision of the Principal Sudder Ameen of Mymensingh, dated the 6th July 1863.

Ram Kishore Acharj Chowdhry (Plaintiff) *Appellant,*

versus

Lukhee Debee Chowdhrain (Defendant) *Respondent.*

Baboos Chunder Madhub Ghose, Greesh Chunder Ghose, and *Mohinee Mohun Roy* for Appellant.

Baboos Dwarkanath Mitter and *Sree Nath Doss* for Respondent.

Suit laid at rupees 10,000.

No other cause of disqualification than those mentioned in Act XIV of 1859 is admissible to save limitation.

Steer, J.—THIS is a suit for the recovery of land from which the plaintiff avers he was dispossessed by the defendant's husband under an Act IV award on the 10th Magh 1254.

It appears that the plaintiff is the adopted son of Chundrabullee Dabee, widow of the late Gour Kishore Acharj. The said Gour Kishore had a natural-born son, Bhowanee Kishore, who married Bhoobun Moye. Bhowanee Kishore having died without issue, a dispute arose between these two ladies as to which of them had a right to adopt. It seems to be admitted, though the dates are not given, that litigation on this point was carried on and lasted for several years; but the adoption of the plaintiff was ultimately confirmed on the 19th April 1860 by a decree of the late Calcutta Sudder Court.

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The plaintiff was not a minor on the 5th May 1859 when Act XIV of 1859 came into operation; nor was he disqualified from suing by reason of his being a lunatic or an idiot. This suit, therefore, ought properly to have been brought within three years from the passing of Act XIV of 1859, that is to say, on the 5th May 1862; but it was not brought until the 30th April 1863, and the first question which arises is whether, under the circumstances, the suit is not barred by lapse of time.

It is urged that, though there are in Act XIV of 1859 only three causes of disqualification actually stated, it does not follow that the law intended to exclude any other good and sufficient cause when that could be shown. But we are clearly of opinion that *only* those specific causes which are cited in the Act can be recognized as grounds of disqualification, and that there are no others.

The plaintiff's case, then, certainly falls within the Statute, and there is but one way left him of getting out of it. He may get out of it, if he is able to show that he is entitled to have the time during which his mother was engaged in the prosecution of her suit excluded in the computation of the period of limitation prescribed by the Act.

Up to the 19th April 1860 the plaintiff's title was uncertain. Though he had been adopted, his adoption was disputed; and it was not until the above date that it was settled by a decree of the Sudder, which however is still in appeal before the Privy Council that the plaintiff was the adopted son, and, as such, entitled to succeed to the property of Gour Kishore Acharj, the husband of his mother by adoption. But the sole question in this previous litigation was as to which of the two ladies, Chundrabullee, the widow of Gour Kishore, or Bhoobun Moye, his daughter-in-law, had the power to adopt. The adoption was the cause of action, and the two ladies were the only parties to it. Inasmuch, therefore, as the present suit is on an entirely different cause of action and is not between the same parties, the plaintiff is not entitled to have the time during from his former suit was pending, excluded which the computation of the period of limitation prescribed by the Act.

The suit should have been brought on or before the 5th May 1862. The plaintiff was at that time under no legal disability, and he is not entitled, by reason of any former litigation, to any extension of time. His suit is, therefore, barred under the provisions of Section 11 Act XIV of 1859, and we need not consider or give any opinion whether it is so on the ground of the action being a *res adjudicata*, or barred under the Special Law of Limitation, Act XIII of 1848.

In this view we confirm the judgment of the Lower Court, and dismiss the appeal with costs.

The 21st June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Bond-debt—Interest.

Case No. 3146 of 1863.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 31st July 1863, modifying a decision of Baboo Kylas Chunder Deo, Principal Sudder Ameen of that District, dated the 28th October 1862.

Gunga Bishun Tewarry and others, (Plaintiffs) *Appellants,*

versus

Roy Mohun Loll Mitter and others (Defendants) *Respondents.*

Mr. T. T. Forbes for Appellants.

Baboo Onookool Chunder Mookerjee for Respondents.

In a suit upon a bond where the genuineness of the bond and the defendant's liability under it are clearly established, the plaintiff is entitled to interest from the time the defendant declined payment of the sum due upon the bond.

Glover, J.—THIS is a question of interest due on a bond. The Court of first instance gave plaintiff (special appellant) a decree for the amount of his claim which included interest, together with interest on the principal sum due, during the time the suit was pending, and further, interest at 12 per cent. on the aggregate of both principal and interest from the date of decree to the date of realization.

The Judge, on appeal, confirmed the order of the Lower Court on the merits of the case, but gave interest only on the principal sum due on the bond, from the date the suit was instituted.

It is urged before us in special appeal that the special appellant is clearly entitled to his

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interest from the time the special respondent declined payment of the sum due on the bond.

We think the objection valid. The genuineness of the bond and the defendant's liability under it being clearly established in both Lower Courts, there was no reason why the special appellant should not have been allowed interest on his money from the date on which the special respondent refused payment. The Judge appears to have overlooked the point. We therefore amend his order to this extent. The special appellant will recover the amount of his claim, which includes interest up to the date of the institution of this suit, with interest on the principal sum lent from that date up to the date of the decree, and on the lump sum will recover interest at 12 per cent. to the date of realization, with costs in proportion.

The 21st June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Transfer of Tenures—Lease by Naib —Recognition and ratification by zemindars.

Case No. 3395 of 1863.

Special Appeal from a decision passed by the Additional Judge of the 24-Pergunnahs, dated the 26th August 1863, reversing a decision of the Principal Sudder Ameen of that District, dated the 31st March 1863.

Bissumbhur Poorkaet and others (Plaintiffs) *Appellants,*

versus

Bhuggobutty Churn Poorkaet and others (Defendants) *Respondents.*

Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Appellants.

Baboo Nil Madhub Sein for Respondents.

Where a zemindar dispossessed the purchaser of a jungleboory tenure, the title of whose vendor was acquired from the zemindar's naib who had no power to grant such a pottah,—HELD that the receipt of rent by the zemindar from the plaintiff and his vendor did not amount to a ratification of the plaintiff's right to hold under the pottah transferred to him by the vendor.

A zemindar is not bound to recognize tenures not created by himself or by any authorized agent on his part.

Steer, J.—THE plaintiff sues for possession of certain lands which he acquired from one Kunjun Moyra. This man is said to have held a pottah for the purpose of clearing jungle, and his tenure the plaintiff asserts to be of the nature of a jungleboore tenure. The plaintiff having been dispossessed by the zemindar in 1263 (1856) sues for possession.

It has been found by the Lower Court that the title of the plaintiff's vendor to the lands in suit was acquired from the zemindar's naib, who had no power to grant such a pottah; and therefore the defendant was justified in refusing to recognize it, and the plaintiff who derives his title on that pottah is not entitled to succeed in his suit.

In special appeal it is contended—

1*st.*—That the Judge has not found whether by the defendant's having consented to receive rents from the plaintiff, he has not in effect confirmed the plaintiff's title to the land.

2*nd.*—Supposing that the plaintiff's pottah falls to the ground, still as, by the defendant's admission, the tenure was a jungleboore one, the defendant had no power to dispossess the plaintiff.

3*rd.*—As defendant rested his case on a resignation of the land said to have been made by the plaintiff's vendor, and he failed to prove it, the case ought to have been decreed in favor of the plaintiff.

On the *first* point we do not think that, even if it is admitted that the defendant took rent from the plaintiff for the years 1261 and 1262, the act amounts to a ratification of the plaintiff's right to hold under the particular pottah transferred to him by the vendor. The acceptance by the defendant, the landlord, from the hands of the plaintiff of the rents heretofore paid to him by the plaintiff's vendor may be evidence that the defendant recognized the plaintiff as the representative of the vendor; but receipt of rent from the vendor would not be an act which necessarily implied that the defendant knew on what title the vendor held, or that he acquiesced in any title he may set up from the naib. For he may have been under the belief that the vendor was a mere cultivator without a pottah, and, as such, had paid him rents, as he was bound to do, for the land he cultivated. The defendant was not fixed with knowledge of the pottah granted by his naib, and the receipt of rent by the defendant could only be regarded as evidence of a confirmation of title on proof adduced that he knew of the pottah.

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On the *second* point we think that, whatever might have been the nature of the pottah which the plaintiff's vendor held, if it was given by a naib and therefore by a person who had no power to give it and was not ratified, the defendant may refuse to acknowledge it or allow a transfer of it, and the plaintiff not having shown that the defendant acquiesced in the title of the vendor, as a jungleboore holder has not shown any right on his part which bars the defendant from the exercise of his undoubted right to refuse to recognize tenures not created by himself or by any authorized agent on his part.

On the *third* point we find that the defendant did not rest his case on the fact that the plaintiff's vendor had resigned the lands. One of his pleas was that the naib had no power to grant the pottah to the vendor, and it was competent to the Judge, therefore, to dispose of the suit on this question.

In this view we dismiss the special appeal with costs.

The 22nd June 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges*.

Right of way.

Case No. 2678 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-*Pergunnahs, dated the* 30*th June* 1863, *reversing a decision of the Moonsiff of that District, dated the* 18*th March* 1862.

Ashootosh Chukerbutty and others (Defendants) *Appellants*,

versus

Teetoo Holdar and another (Plaintiffs) *Respondents*.

Baboos Anund Chunder Ghosal and *Kally Mohun Doss* for Appellants.

Baboo Anund Gopal Paulit for Respondents.

A right of way by sufferance over another's land cannot create a permanent right.

Seton-Karr, J.—BOTH the Lower Courts have found that the road is not a public road, and the Appellate Court has found that the land, which the plaintiff wishes to enclose, wholly belongs to plaintiff. The right of the defendant is not based on any public use of the road by the community, but on a right to make use of the plaintiff's land for his own convenience. This use by sufferance cannot create a permanent right in the defendant's favor. In fact it seems quite clear that the defendants never had more than the temporary use of a path over what is indubitably the plaintiff's property.

The argument that the Civil Courts have no jurisdiction in a matter of this kind is wholly untenable.

We see no error of law in the decision of the Appellate Court, and dismiss this appeal with costs.

The 22nd June 1864.

Present:

The Hon'ble F. B. Kemp and A. G. Macpherson, *Judges*.

Sale Law — Right of auction-purchaser—Lakheraj (Resumption and assessment of).

Case No. 2816 of 1863.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 14*th August* 1863, *reversing a decision of the Principal Sudder Ameen of that District, dated the* 12*th February* 1862.

Dabee Munnee Chowdhrain and others (Defendants) *Appellants*,

versus

Faqueer Chunder Shaha and others (Plaintiffs) *Respondents*.

Baboos Sreenath Doss and *Kishen Dyal Roy* for Appellants.

Baboos Onokool Chunder Mookerjee and *Hem Chunder Banerjee* for Respondents.

Where the former proprietor had a right to bring a suit to resume and assess lakheraj land, the auction-purchaser of his rights and interests has acquired the same right under Section 54 Act XI of 1859.

Kemp, J.—WITHOUT adopting the reasoning of the Judge, we think that his decision is substantially correct. The former proprietor was not estopped from bringing a suit to resume and assess the lakheraj in the occupation of the defendant, and the present plaintiff, who is a purchaser of a share of a joint estate under the provisions of Sections 13 and 14 of Act XI of 1859, is not precluded from doing so. If the previous owner possessed a right of action, the auction-purchaser of his rights and interests has acquired the same right under Section 54 of the Sale Act. We dismiss the appeal with costs and interest.

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The 22nd June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Pre-emption.

Case No. 3186 of 1863.

Special Appeal from a decision passed by Moulvie Iradut Ali Khan, Principal Sudder Ameen of Shahabad, dated the 31st July 1863, reversing a decision of Baboo Rampersad, Moonsiff of that District, dated the 23rd December 1862.

Maharaj Sing (Plaintiff) *Appellant,*

versus

Lallah Bhuchook Lall (Defendant) *Respondent.*

Mr. T. T. Forbes for Appellant.

Mr. A. F. Lingham for Respondent.

The act of a claimant springing up from his seat and claiming his right of pre-emption instead of claiming it from a sitting posture, cannot be deemed a delay sufficient to entail a forfeiture of his right.

Loch, J.—THE question before us is whether the plaintiff has forfeited his right to pre-emption by not claiming it with immediate despatch. The Principal Sudder Ameen, who was Law Officer of Zillah Tirhoot for several years, reverses the decision of the first Court, and holds that plaintiff has forfeited his right to pre-emption, because, when he heard of the sale, he changed his position, that is, he rose up from a sitting position and, standing up, claimed the right of purchase. There appears to have been no other delay than the moment required to rise from a sitting to a standing posture. There was no silence after hearing of the sale, but an immediate assertion of his right. We think the Principal Sudder Ameen has made the legal difficulties attending the enforcement of the claim to pre-emption more difficult than he is warranted to do by the law. In case I of the Precedents quoted in Macnaghten's Mahomedan Law, Chapter Pre-emption, we find that it is held by some authorities that the immediate claim should be made in the assembly where the claimant hears of the sale before it breaks up; and again, that liberty to claim the right of pre-emption remains till the assembly breaks up. According to other authorities, if silence be observed even for a short time after the receipt of the intelligence of the sale, the right is lost. But according to the Hedaya, Vol. IV, page 570, a short time may be allowed for reflection. The law requires immediate despatch to be used, and the very natural action which the plaintiff in this case is said to have performed, that of springing from his seat and at the same time claiming his right, cannot, we think, be under any circumstances construed into a delay sufficient to entail forfeiture of his right. We reverse the order of the Principal Sudder Ameen on this point, and remand the case for a decision on the merits.

The 23rd June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Co-defendants — Section 348 Act VIII of 1859 — Objection by way of cross-appeal.

Case No. 3405 of 1863.

Special Appeal from a decision passed by Mr. J. W. Hutchinson, Additional Principal Sudder Ameen of Burdwan, dated the 2nd July 1863, reversing a decision of the Moonsiff of that District, dated the 3rd of July 1862.

Burroda Soonduree Dossee (Plaintiff) *Appellant,*

versus

Nobo Gopal Mullick and others (Defendants) *Respondents.*

Baboo Nil Madhub Bose for Appellant.

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Baboos Chunder Madhub Ghose and *Raj Chunder Misser* for Respondents.

One defendant cannot take an objection under Section 348 Act VIII of 1859 on the appeal of a co-defendant.

Levinge, J.—In this case we can give no relief to the special appellant Burroda. She was made a co-defendant with Hurreenarain and Nubbo. Hurreenarain alone appealed, the Judge of the first Court being in favor of the plaintiff, decreeing that he was entitled to possession as against all the defendants Burroda filed no appeal, but only made objections under the 348th Section of Act VIII of 1859 on an appeal taken by a co-defendant. This was irregular. Burroda should have filed her appeal. *Vide* Sudder Dewanny Decisions, 13th April 1863, where the following passage will appear:—"A co-defendant has asked the Court to entertain his appeal under Section 348 Act VIII of 1859; but we are of opinion that this Section does not apply as between two co-defendants, but solely as between an appellant and a respondent. The co-defendant cannot be heard in this appeal." Burroda has notwithstanding filed her special appeal. We must dismiss it with costs.

Under Burroda's irregular and unsustainable special appeal, Hurreenarain has filed his objection under Section 348. We cannot, therefore, hear his appeal except as a favor; but before we allowed him the privilege of converting his objections into a formal special appeal, we investigated his case. It is not denied by his pleader, indeed could not be that he cannot have a title to the lands sued for from the two widows, wives of Juggessur. His last hope remains to prove a title from Nubo. But it is found by the Court below that Nubo had *no title* to the land in question; therefore he had nothing to convey to Hurreenarain. We are asked to let him raise the technical objection that the Court threw the *onus probandi* wrongly on Nubo (who has not appealed), but that objection was not taken, and we cannot now allow it to be raised.

The 23rd June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Land Disputes—Section 318 Code of Criminal Procedure—Possession.

Case No. 3407 of 1863.

Special Appeal from a decision passed by Baboo Banee Madhub Shome, Principal Sudder Ameen of Midnapore, dated the 26th September 1863, reversing a decision of Baboo Mohesh Chunder Roy, Moonsiff of Gurbetta, dated the 9th July 1863.

Shib Persad Roy and others (Plaintiffs) *Appellants,*

versus

Rughoo Nath Singh and others (Defendants) *Respondents.*

Baboo Nobokissen Mookerjee for Appellants.

Baboo Poorno Chunder Mookerjee for Respondents.

Section 318 of the Code of Criminal Procedure does not mean that any party, who can show in the Civil Court a possession prior to the Magistrate's award, shall be entitled to have the award set aside and to be put in possession; but only that the party out of possession must prove title.

Steer, J. This is a suit for possession of ten beegahs of land alleged by the plaintiff to be his debutter property, from which the defendant has ousted him.

It appears that there was a dispute between the parties to this suit about this land, and that the Magistrate, under the provisions of Section 318 of the Code of Criminal Procedure, upheld the possession of the defendant.

This Section provides that the party whom the Magistrate may decide to be in possession, is entitled to retain possession until ousted by due course of law. This does not mean that any party who can show in the Civil Court a possession prior to the Magistrate's award, shall be entitled to have the award set aside and to be put in possession; but it means that the party out of possession must prove title. The proof of title being properly held to have been on the plaintiff, and he has not discharged it, there is no ground for this special appeal, and it is dismissed with costs.

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The 23rd June 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Limitation—Co-sharers.

Case No. 2135 of 1863.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Additional Judge of the 24-Pergunnahs, dated the 6th July 1863, affirming a decision of Baboo Tarucknath Sein, Principal Sudder Ameen of that District, dated the 24th September 1862.

Shibo Sundari Dasi (Plaintiff) *Appellant,*

versus

Kali Churan Rai and others (Defendants) *Respondents.*

Mr. W. A. Montriou and *Baboos Hem Chunder Banerjee* and *Anund Chunder Ghosal* for Appellant.

Baboos Chunder Madhub Ghose and *Ashootosh Dhur* for Respondents.

The non-receipt of a share of the profits of an estate is no cause of action between shareholders from which limitation runs.

Seton-Karr, J.—THIS case has been very fully argued before us by Counsel for the appellant, and by the pleader for the respondent. The plaintiff and defendant are the representatives of two brothers, who, in their lives, lived in commensality. The predecessor and representative of the defendant, who was one Ram Lochun, made a present of a share of a self-acquired talook to his brother Gooroo Dass, now represented by the plaintiff, by virtue of an ikrar, in which at the same time the donor recited that his brother was entitled to one-half of the ancestral property, and that he was to receive his share of the profits of both estates until such time as there should be a regular division.

This ikrar the Judge has found to be proved by evidence, and though the special respondent urges before us that such a finding is not supported by any evidence at all, we find from the record that the said ikrar was executed 40 years ago; that it was produced in Court before the Revenue Authorities; that it was brought to the knowledge of the respondent; and that its validity was never before questioned. We hold, therefore, that the Judge was fully justified in his finding.

The case then is narrowed to this. It is admitted that Gooroo Dass, the donee, for more than 12 years after the death of Ram Lochun, the donor, ceased to receive his share of the profits of the estate, and the Judge has found the claim of the plaintiff, who represents Gooroo Dass's interests, barred by limitation by reason of this very fact, the non-receipt of any of the profits for such a period of time.

We concur in the arguments advanced by Mr. Montriou that this position is not a sound one. The relation between the parties remains unaltered, as well as the rights on the part of Gooroo Dass and his heirs to receive a share of the profits. The non-receipt of any share is no cause of action between parties so situated. Every payment of rent from the estate to Ram Lochun or his heirs, is a payment on behalf of Gooroo Dass and his heirs also, and is a fresh cause of action. That Gooroo Dass, from some cause or other, never asked for his share for many years, makes no difference. He cannot be held to have thus waived or reliuquished his claim. Therefore, applying the usual law applicable to shareholders, where one shareholder manages the whole and is accountable to the others, we declare the plaintiff's suit not barred by limitation, and reversing the decision of the Lower Courts, we remand the case for trial on the merits by the first Court.

We may observe that, though the right to demand an account of the share, and to recover possession in the shape of rent, is thus not barred, it may still be for the Lower Courts to consider to how many years back rents the plaintiff will be entitled under the laws and precedents in force. All we now rule is that his legal right to his share is neither absorbed, nor waived, nor barred by limitation.

The 24th June 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Remand—Additional Evidence.

Case No. 2736 of 1863.

Special Appeal from a decision passed by Mr. James Reily, Principal Sudder Ameen of Dinagepore, dated the 29th June 1863, reversing a decision passed by the Moonsiff of that District, dated the 31st May 1862.

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Kallee Sunkur Roy and others (Defendants) *Appellants,*

versus

Kishto Doolal Chowdhry (Plaintiff) *Respondent.*

Baboo Prosunno Coomar Sein for Appellants.

Baboo Debendro Narain Bose for Respondent.

When the decision of a Lower Court is on a preliminary point, the Lower Appellate Court cannot remand the suit to that Court with directions to take further evidence and to re-try the case, but must keep the appeal pending on his file and send the record to the Lower Court to take the necessary evidence.

Jackson, J.—THE Principal Sudder Ameen has remanded this suit with direction to the Moonsiff to take further evidence and to re-try the case. It is urged that the Principal Sudder Ameen has, under Section 351, no authority to remand the case on this ground, the decision of the Lower Court being not on a preliminary point. This objection is, we think, good. The Principal Sudder Ameen cannot remand. He must keep the appeal pending on his file and send the record to the Moonsiff under Sections 355 and 356, with orders to take whatever evidence he requires examined. The Principal Sudder Ameen's order of remand is reversed, and he will now pass orders according to law.

The 24th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Special Appeal—Suit by lessee for refund of Government Revenue.

Case No. 3216 of 1863.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 26th August 1863, *affirming a decree of the Sudder Ameen of that District, dated the 27th November* 1862.

Mr. John White (Plaintiff) *Appellant,*

versus

Tripora Sunkur Mookerjee (Defendant) *Respondent.*

Baboo Ashootosh Dhur for Appellant.

Baboos Greesh Chunder Ghose and *Onookool Chunder Mookerjee* for Respondent.

In a suit by a lessee upon a contract for a refund of excess revenue remitted by Government, a special appeal is not admissible if the amount claimed be under rupees 500.

Loch, J.—BEFORE entering into this case, a preliminary objection was taken by the opposite party that a special appeal was not admissible in this case under the provisions of Section 27 Act XXIII of 1861.

The plaint shewed that the suit was brought upon a certain ikrarnamah, in which the defendant declared herself not to have any interest in the increase or decrease of the Government revenue, but was to receive a fixed sum of rupees 127 from the plaintiff. The Government had ordered a reduction of the jumma assessed upon this estate, and directed that what had been collected in past years in excess of that jumma should be refunded. Plaintiff claimed the refund, and brought his action on the strength of this contract with the defendant in the Sudder Ameen's Court who dismissed his claim, an order confirmed in appeal by the Judge. It is contended that the suit was properly cognizable in the Small Cause Court, the money being due on a contract pleaded by the plaintiff; that the sum claimed was under 500 rupees, and, therefore, under the provisions of Section 27 Act XXIII of 1861, no special appeal could be made. We think the view taken by the pleader is correct, and that the objection taken is valid, and we, therefore, dismiss the appeal with costs.

The 24th June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Possession—Mesne Profits—Splitting.

Case No. 3415 of 1863.

Special Appeal from a decision passed by the Additional Judge of Behar, dated the 15th August 1863, *affirming a decree of the Sudder Ameen of that District, dated the 5th September* 1862.

Sheikh Afzul Hossein and others (Defendants) *Appellants,*

versus

Mussamut Misrun and others (Plaintiffs) *Respondents.*

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Mr. John Baptist for Appellants.

Mr. C. Gregory for Respondents.

Where, in a former suit for possession, the Court decreed possession and wasilat from date of suit to date of recovery of possession, a further suit for wasilat from date of plaintiff's dispossession to date of former suit was held not barred.

Steer, J.—It appears that the plaintiff brought a former suit for possession. He got a decree for possession, and, though he did not ask for it, the Court awarded him wasilat from the date of suit to the date of recovery of possession in execution of the decree.

The present suit is for wasilat from the date of dispossession, *viz.* 15th Bysakh 1260 to 15th Aghran 1265, the date of recovery, excluding from that period the time that the former suit was actually pending investigation, *viz.* from Assin 1261 to Kartick 1262.

The Courts have decreed the claim.

We think that the plaintiff cannot recover in this suit what he might have recovered under the former decree. Under the former decree he might have recovered wasilat from the date of the institution of the suit, *viz.* Assin 1261 to 15th Aghran 1265, when he recovered possession. Excluding this period, the plaintiff, we hold, is entitled to wasilat only from the date of dispossession, *viz.* 15th Bysakh 1260 to the date of the institution of the former suit, *viz.* Assin 1261.

We modify the decision of the Lower Court accordingly, and the parties will be charged with costs in proportion.

The 24th June 1864.

Present:

The Hon'ble F. B. Kemp and A. T. T. Peterson, *Judges.*

Mortgage—Notice of Foreclosure—Sale in Execution.

Case No. 2884 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 9th July 1863, *affirming a decision of the Moonsiff of that District, dated the 11th March* 1863.

Deokee Misser and others (Defendants) *Appellants,*

versus

Ram Golam Roy and others (Plaintiffs) *Respondents*

Baboos Kishen Succa Mookerjee and *Kally Kishen Sein* for Appellants.

Mr. John Baptist and *Moonshee Ameer Ali* for Respondents.

The notice which the law requires to be served previous to foreclosure is to be served on the mortgagor or his legal representative.

Where a portion of the mortgaged property is sold in execution of a decree, if the decreeholder has a priority of right over the mortgagee, the balance, if any, of the sale proceeds will go in diminution of the mortgagee's claim.

Kemp, J.—The special appellant is the mortgagor. He admits the mortgage which was foreclosed in March 1859. The present suit is for possession, and both the Lower Courts have given the plaintiff a decree.

In special appeal it is contended,—

1*st.*—That, inasmuch as several mouzahs were mortgaged and two of the properties were subsequently sold in execution of a decree, and the mortgagee deducted the surplus sale proceeds in diminution of his debt, the notice previous to foreclosure ought to have been issued upon the mortgagor and the purchasers, and not upon the mortgagor alone.

2*nd.*—That, under the terms of an ikrarnamah executed by the mortgagee, it was stipulated that the whole sum borrowed should be repaid in one sum and on one date; that the mortgagee in violation of the terms of the ikrar has received a portion of the sum lent by appropriating the surplus sale proceeds of the two mouzahs sold in execution, in diminution of his claim.

We think that there are no grounds for this special appeal. The notice which the law requires to be served previous to foreclosure, is to be served on the mortgagor or his legal representative. We have not been shown that the purchasers have purchased the equity of redemption, or that they are the heirs of the mortgagor. They are, therefore, not the legal representatives of the mortgagor.

We may observe that, if the decree-holders had a priority of right over the mortgagee, the balance, if any, of the sale proceeds would go in diminution of the mortgagee's claim. If the equity of redemption was sold, then the mortgagor's title is altogether destroyed.

On the second point we think there has been no violation of the ikrar. The security upon which the monies was originally advanced being diminished by the sale of a portion of the properties, the mortgagee was entitled to claim in diminution of his loan the sale proceeds as representing that security.

The appeal is dismissed with costs and interest.

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The 24th June 1864.

Present:

The Hon'ble F. B. Kemp and A. G. Macpherson, *Judges.*

Objection under Section 348 Act VIII of 1859—Estoppel—Co-defendants.

Case No. 2835 of 1863.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 29th June 1863, reversing a decree of Baboo Taruk Nath Sein, Principal Sudder Ameen of that District, dated the 27th of June 1862.

Mudhoo Mokee Dabee (Defendant) *Appellant,*

versus

Gunga Govind Mundle and others (Plaintiffs) *Respondents.*

Baboos Romesh Chunder Mitter and *Chunder Madhub Ghose* for Appellant.

Baboos Unneda Persad Banerjee and *Mohesh Chunder Chowdhry* for Respondents.

A respondent may take any objection under Section 348 Act VIII of 1859.

A decision in a former suit cannot operate as an estoppel as between co-defendants in that suit or parties claiming under them.

Kemp, J.—THE defendant is the special appellant. The plaintiff alleges that he purchased the disputed land from the mortgagee, Surbessur Chowdhry, after foreclosure which took place in 1832. The plaintiff's purchase is dated in February 1853. The defendant contends that the land in dispute was not included in the property mortgaged to the plaintiff's vendor, and that it belonged to Panchee Dabee, from whom defendant has derived by purchase. Limitation was also pleaded.

The Principal Sudder Ameen overruled the plea in bar, and gave the plaintiff a decree for a portion of the land claimed. The plaintiff appealed. The defendant (respondent in the Lower Appellate Court) under the provisions of Section 348 of the Code of Civil Procedure, took objection to the decision of the Court of first instance, to wit—that the suit of the plaintiff was barred under the Statute of Limitations, and that the wrong issue had been tried. The Judge, Mr. F. L. Beaufort, remarks "that the party who does not file a memorandum of appeal, cannot be in a better position than the one who does file such a memorandum;" and as by Section 334 the appellant cannot, without the leave of the Court, urge any other ground of objection than that set forth in his memorandum, I am of opinion that the respondent cannot take any objection without the leave of the Court. Now, when the Lower Court rejects the plea of limitation, it seems to me that the defendant, who has raised it, should file an appeal on that ground, if he desires to urge it in the Appellate Court, and should not wait for the appeal of his opponent. I am of opinion that the Principal Sudder Ameen rightly rejected the plea of limitation on the ground of decrees for rent of land in dispute, in which Witooree Soonderee intervened on the strength of her purchase of this land, and without success; *but I declined to admit it as a ground of appeal.*

On the merits the Judge observed "that the grounds on which the Principal Sudder Ameen had restricted the plaintiff's claim to a portion of the land, were not satisfactory."

He proceeds to observe "that it is admitted that the lands claimed in this suit are identical with the lands claimed in a suit brought by one Juggeshur Ghose; that the party through whom the defendant derives title was a party to that suit, in which the decree was in favor of Surbessur, the plaintiff's vendor, and against the parties through whom defendant derives title; and that possession was given to the plaintiff's vendor, Surbessur, by the nazir of the Court in execution of the decree; that, as plaintiff had succeeded to the rights of Surbessur, he is entitled to the whole of the land the subject of this suit."

In appeal to this Court it is contended, 1*st*,—that the Judge is wrong in law in his interpretation of Section 348 of the Code of Civil Procedure; 2*nd*,—that the wrong issue has been tried, the proper one being whether the land claimed in the suit was included in the mortgage made by Ram Chunder to Surbessur, the plaintiff's vendor; 3*rd*,—that the defendant, special appellant, is not bound by the decision in the case of Jugesshur.

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We are of opinion that the Judge's interpretation of Section 348 is clearly wrong. That Section is as follows :—" Upon the hearing of the appeal, the respondent may take any objection to the decision of the Lower Court, which he might have taken if he had preferred a separate appeal from such decision." This Section repeals the provisions of Clause 3 Section 7 Act XV of 1853. The objection may be taken orally. We would refer the Judge to the decisions of this Court in the cases of Issur Ghose *versus* Hills, decided on the 4th of September 1862, and Ramnarain Bhuttacharjee *versus* Moheschunder, decided on the 18th of December 1862, and reported in the January No. of 1863, page 79. The Section quoted by the Judge, Section 334, refers to appellants and not to respondents. The Judge was therefore wrong in declining to permit the respondent before him (special appellant in this Court) to take objection to the decision of the Court of first instance.

The Judge refers to decrees for rent in which the defendant is said to have intervened. We find that in one case Witooree Soonderee intervened; but that in the other case she did not do it; but be this as it may, as the Judge has declined to admit the plea of limitation as a ground of appeal, there has been an error in law in the procedure and investigation of this case, and it must be remanded to try whether the suit of the plaintiff is barred or not.

We are further of opinion that the suit of Jugesshur, alluded to by the Judge, is not an estoppel. The vendor of the defendant was a party to that suit in the capacity of co-defendant with the plaintiff's vendor. Juggesshur claimed some land which may or may not be identical with the land now claimed. Both the defendants in that suit opposed his claim and it was dismissed. There could therefore have been no proceedings in the execution stage of that case giving possession to the present plaintiff.

That suit did not dispose of or determine any cause of action as between the co-defendants in that suit, so as to bind them or the parties who claim under them.

The proper issue for trial in this suit, after disposing of the issue in bar, is this—Were the disputed lands included in the mortgage by Rajchunder to Surbessur, plaintiff's vendor, and for which the latter obtained foreclosure in 1832 or not ?

The suit is remanded for trial with reference to the above remarks. Costs to follow the result.

The 24th June 1864.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Champerty—Transfer.

Case No. 3230 of 1863.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 25th August 1863, *affirming a decision passed by Mr. W. Wright, Principal Sudder Ameen of that District, dated the* 11*th April* 1863.

Punchanun Muzoomdar (Defendant) *Appellant,*

versus

Doorga Nath Roy (Plaintiff) *Respondent.*

Baboos Baneenath Bose and *Kishen Dyal Roy* for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

The Courts will not interfere when a transfer is completed at once—*e. g.* where a party buys a certain share of a litigant's risk and stands or falls by his purchase, having only the right to recover his share from the party suing if the latter wins his case, and having no claim at all if the Courts decide against him.

Quære.—Whether, in the present state of the law in India, champerty can be pleaded at all.

Glover, J.—PLAINTIFF (special appellant) sued to recover possession of a 9 gundah share of Mouzah Ruplee, with mesne profits, as also a fourth share of certain moveables left by one Unnopoorna Dassea, the special appellant's paternal uncle's wife. It appears from the record that the special appellant was the legal heir to all Unnopoorna's property, but being too poor to bring a suit for the enforcement of his rights, which had been contravened by third parties, his relations. Special respondent advanced him rupees 301 for the purpose, receiving in exchange a conveyance of the 9 gundah share of the real property and of a fourth share of the moveables abovementioned. Special respondent was also to have a fourth share of any "*wassilat*" that might be decreed to the special appellant, supposing him to gain his suit.

The relatives finding special appellant prepared to assert his rights, gave up the disputed property. But the latter refused to fulfil his bargain with the special respondent, and this suit was accordingly brought to recover.

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The Court of first instance decreed the claim, and the Judge on appeal confirmed the order, with the exception of that part of it relating to wassilat previous to the purchase.

It is urged in special appeal—

(1.) That the suit ought to have been dismissed on the ground of champerty, and that the Judge's ruling on this point was wrong.

(2.) That special appellant was not liable for wassilat for the time he was not in possession of his land.

(3.) That although a part only of special respondent's claim was decreed, the Judge has saddled special appellant with all the costs of suit.

With regard to the *first* objection, we think it doubtful whether, in the present state of the law, champerty can be pleaded at all. The decision of the Sudder Dewanny Adawlut dated May 13th, 1852, in the case of Kishen Lal, goes far to uphold this opinion; but in any case the Courts will not interfere when the transfer is completed at once; where, for instance, as in the present case, a party buys a certain share of a litigant's risk, and stands or falls by his purchase, having only the right to recover his share from the party suing if the latter wins his case, and having no claim at all supposing the Courts to decide against him. We observe, further, that there was no suit at all instituted, the special appellant having gained his rights without legal intervention.

The *second* objection is valueless. The special respondent is entitled to claim "wassilat" from the date of his purchase. And the point now urged, *viz.*, that special appellant was out of possession, part of the time was not specifically pleaded in the Court below.

The *third* objection must be, we think, allowed. The Judge has, through inadvertence most probably ordered the special appellant to pay the entire costs of the suit, although he has excused him from part of his liability. The deduction is of the most trifling nature, not amounting, we understand, to above 3 rupees; still, small as it is, the special appellant is entitled to it; and so far we amend the Lower Court's decision. In all other respects the appeal is dismissed with proportionate costs.

The 27th June 1864.

Present:

The Hon'ble Shumboonauth Pundit and E P. Levinge, *Judges.*

Suit on lost or destroyed judgment—Limitation.

Cases Nos. 3057 to 3059 of 1863.

Special Appeals from decisions passed by Mr. A. W. Russell, Officiating Judge of Behar, dated the 1st August 1863, affirming decisions of Baboo Tarrakant Bidyasagur, Principal Sudder Ameen of that District, dated the 28th January 1862.

Ranee Emamun and others (Plaintiffs) *Appellants,*

versus

Hurdyal Sing and others (Defendants) *Respondents.*

Baboos Kissen Succa Mookerjee and *Debendro Narain Bose* for Appellants.

Baboo Kally Kissen Sein for Respondents.

A suit was held to lie for the amount of an unsatisfied claim adjudged by a decree which was destroyed during the mutiny, and the cause of action to date from the lost decree.

Levinge, J.—It is admitted that the decision in one of these appeals will govern the rest. This was a suit on a lost or destroyed judgment. The amount now sued for had been decreed by the first Court, but the Judge reversed the finding, holding that the subject matter of this suit was barred as *res judicata* under Section 2 Act VIII of 1859. We reverse that finding, as it was competent to the plaintiff to sue for the amount of an unsatisfied claim which had been adjudged to him, the decree having been destroyed in the late mutiny, pending an appeal taken by the defendants on the point of costs. The whole amount of the original debt on the bond had been decreed, but it has never been realized; so we hold there is no necessity to remand this case.

The Judge gave it also as his reason for dismissing the suit that the claim was barred by the Statute of Limitation, but this plea was not taken in the Lower Court; and if it had been, there was no bar, as the cause of action dates from the lost decree. Appeal allowed in favor of plaintiff with costs.

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The 27th June 1864.

Present:

The Hon'ble Shumboonauth Pundit and E. P. Levinge, *Judges.*

Alluvial Land.

Case No. 3010 of 1863.

Special Appeal from a decision passed by Mr. A. A. Swinton, Judge of Tipperah, dated the 7th August 1863, *affirming a decision of Baboo Dwarkanath Roy, Principal Sudder Ameen of that District, dated the 13th March* 1861.

The Collector of Tipperah (Plaintiff) *Appellant,*

versus

Doorga Persad Paray and others (Defendants) *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

Baboo Dwarkanath Mitter for Respondents.

The drying of the river, or its becoming fordable, between a reformed chur and *A*'s estate, does not divest the property from *B* on whose estate it formerly formed, and give it to *A*.

Levinge, J.—In this special appeal it is argued that, as the disputed land has accreted to the Government estates, it belongs to the Government, and that the finding that it has reformed on the old site on which was formerly the land of the defendant, gives to the defendant no title. But we are of opinion that, as it has been found as a matter of fact that up to 1857 this very disputed chur had not accreted or been joined to the Government lands, but was separated by a navigable body of water, the drying up of that portion of the river *or its becoming fordable,* will not divest the property from the defendant and give it to the plaintiff as an accretion to his estate. Appeal dismissed with costs.

The 27th June 1864.

Present:

The Hon'ble F. B. Kemp and A. T. T. Peterson, *Judges.*

Damages—Slander and assault.

Case No. 2901 of 1863.

Special Appeal from a decision passed by Baboo Kalee Kinkur Roy Bahadoor, Judge of the Small Cause Court (vested with the powers of a Principal Sudder Ameen) of Chittagong, dated the 25th July 1863, *reversing a decision of Gopal Chunder Ghose, Officiating Sudder Ameen of that District, dated the 26th July* 1862.

Meer Hossein and others (Defendants) *Appellants,*

versus

Meer Bakir Ali (Plaintiff) *Respondent.*

Moulvie Aftabooddeen Mahomed for Appellants.

Baboo Mutty Lal Mookerjee for Respondent.

Special damages are not necessary to be proved in a case of slander and assault.

Peterson, J.—This is an action of slander and assault, damages laid at 800 rupees. In the Court of first instance the plaint was dismissed, and this decree was affirmed by the Principal Sudder Ameen. On review of judgment, this decision was reversed, and damages 20 rupees and half costs given to plaintiff. The defendant appeals from this decision on the ground that plaintiff proved no special damages. The Court observes that special damages are not necessary to be proved in a case of this sort; and that on the portion of the appeal relating to costs, the Court declines to interfere. Appeal dismissed with costs.

The 27th June 1864.

Present:

The Hon'ble Sumbhoonath Pundit and E. P. Levinge, *Judges.*

Limitation—Section 11 Act XIV of 1859.

Case No. 3017 of 1863.

Special Appeal from a decision passed by the Judge of Patna, dated the 15th July 1863, *affirming a decision of the Principal Sudder Ameen of that District, dated the 26th March* 1863.

Guz Behary Sing and others (Plaintiffs) *Appellants,*

versus

Mussamut Bebee Washun and others (Defendants) *Respondents.*

Mr. J. Baptist for Appellants.

Mr. C. Gregory and *Baboo Unnoda Persaud Banerjee* for Respondents.

The object of Section 11 Act XIV of 1859 is merely that no limitation will apply to a case in which the

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person suing was disqualified at the time when the cause of action arose, though the suit might be brought after the ordinary period, provided it is brought within three years of the time when the disqualification ceased.

Pundit, J.—It is clear that Section 11 of Act XIV of 1859 does not apply to this case. That Section does not after all mean anything but this, that no limitation will apply to a case in which the person suing was disqualified at the time when the cause of action arose, though the suit might be brought after the ordinary period, provided it is brought within three years of the time when the disqualification ceased. It could not be intended that minors should have less period for suing than adult persons have. The effect of Section 11 was not to curtail but to enlarge the time for the disqualified. The action being within twelve years of the original cause of action, we think limitation does not apply. The case is, therefore, remanded to the Court of first instance for trial on the merits.

The 27th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Contribution—Co-debtors.

Case No. 3224 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 30th July 1863, modifying a decision of the Sudder Ameen of that District, dated the 21st February 1862.

Mr. H. A. Eglinton (Plaintiff) *Appellant,*

versus

Koylashnath Muzoomdar and others (Defendants) *Respondents.*

Baboo Bhyrub Chunder Banerjee for Appellant.

Baboo Kally Mohun Dass for Respondents.

Where parties are bound by a joint liability, and one of them discharges the whole debt due to the creditor, he may bring an action against his co-debtors for a contribution by each of them for his share of the sum due to the original creditor. The plaintiff in such a case can only sue each of the co-debtors for his share of the amount paid, and a decree should not be given jointly and severally, but severally against each of the defendants for the contribution due by each.

Loch, J.—The plaintiff in this case was one of several defendants in a previous suit condemned to pay costs jointly and severally. On execution being taken out, plaintiff paid the whole amount, and now seeks to recover from his co-defendants the sums due from them which he has paid on their account *minus* the share due by himself.

The first Court gave a decree for the plaintiff. In appeal certain parties stated through their vakeels that they were willing to pay their shares to the plaintiff, and that "the object of appeal was to have this "point determined; and the Court held "that it would be very oppressive upon "them in case they are made jointly liable "for the sum,—for in case of joint liability "the party may have to pay another debt:" and it therefore separately adjudged four shares against the four appellants giving them costs in proportion.

A special appeal has been preferred from this judgment, on the ground that, as plaintiff had paid the whole debt, he was entitled to get a decree similar to that which was enforced against him, and that all the defendants should be made jointly and severally liable.

We have been referred by the pleader for the respondents to Pothier on Obligations, Vol. I, page 163, Ed. 1806; and find also in Story's Equity Jurisprudence, Vol. I, page 568 and following, the rule laid down to the following effect that, where parties are bound by a joint liability, and one of them discharge the whole debt due to the creditor, he may bring an action against his co-debtors for a contribution by each of them for his share of the sum due to the original creditor. The plaintiff in such a case can only sue each of the co-debtors for his share of the amount paid, and a decree should not be given jointly and severally, but severally against each of the defendants for the contribution due by each. We, therefore, reject the special appeal with costs; but, instead of dismissing the suit as improperly brought, we amend the decree of the first Court which has made the defendants jointly and severally liable for the claim, and make them severally liable each for his own share of the sum paid by the plaintiff to the original creditor.

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The 28th June 1864.

Present :

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Pre-emption—Onus probandi.

Case No. 3431 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 11th of September 1863, modifying a decision of the Sudder Ameen of that District, dated the 19th May 1863.

Sheikh Mahomed Noorul Hossein and others (Plaintiffs) *Appellants,*

versus

Sheikh Hyder Buxsh and others (Defendants) *Respondents.*

Moulvie Aftabooddeen Mahomed for Appellants.

No one for Respondents.

Where a party claiming a right of pre-emption impugns the correctness of the price stated in the deed of sale, the burden of proof is on him to show that the property had in fact been sold below the stated price.

Steer, J.—The plaintiff sued to establish a right of pre-emption.

The Court of Appeal below has found that the price of the property was 1,975 rupees, and that one Pureag Singh having acquired by purchase a share in the same property, his right to make the purchase, which plaintiff sues to have transferred to himself, was not inferior to that of the plaintiff.

It is against these findings that objection is now raised in special appeal. It is contended that defendant was bound to prove that the real price for which the property was purchased was 1,975 rupees, and it was not enough that the deed of sale of Pureag Singh was produced, but there should have been independent evidence that the sale was really made, and that he was a co-sharer.

We think that, where a party claiming a right of pre-emption impugns the correctness of the price stated in the deed of sale, the burden of proof is on him to show that the property had in fact been sold below the stated price ; but the special appellant gave no such proof.

In respect to the second point, we find that Pureag brought the property in January 1862 from Racha Singh, who again bought it in 1857. Both deeds were produced, and other evidence was relied on as establishing the fact that Pureag Singh was as much entitled to buy the property on the occasion of its sale in January 1862 as the plaintiff.

We hold, therefore, that the objections raised against the decision of the Lower Court are untenable, and we dismiss the special appeal without costs, special respondent not being present.

The 28th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Plea of Minority — Evidence—Onus probandi.

Case No. 3258 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 11th August 1863, reversing a decree of the Moonsiff of Kootulpore, dated the 6th August 1862.

Khetter Mohun Ghose (one of the Defendants) *Appellant,*

versus

Ramessur Ghose (Plaintiff) *Respondent.*

Baboos Romanath Bose and *Baneenath Bose* for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

The appearance of an alleged minor may be taken into consideration in disposing of his plea of minority, but the decision must rest mainly upon positive evidence which he is bound to produce.

Loch, J.—The mode in which the Lower Courts have disposed of the question of minority is not satisfactory. Plaintiff comes into Court claiming to recover certain property sold in execution of a decree so far back as 1844, and pleads that he was a minor up to 1260-1853, and that this suit, instituted on 18th June 1862, is within time. Instead of obliging the plaintiff to prove this distinct allegation regarding his age, the Lower Appellate Court appears to have satisfied itself that from his appearance plaintiff could not be more than 30 at present, and, consequently, when the property was sold, *viz.* in 1844, he must have been a minor. Of course, the appearance of the individual should be taken into consideration in disposing of such a question as that of minority ; but the decision must rest mainly upon positive evidence, which plaintiff is bound

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to produce. If the plaintiff have produced such, the Lower Court has pronounced no opinion upon it. We, therefore, remand the case to the Principal Sudder Ameen, directing him to dispose of it with reference to the above remarks.

The 28th June 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Admission—Pleadings—Attachment—Adverse possession—Limitation

Case No. 2725 of 1863.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 19th June 1863, reversing a decision of the Principal Sudder Ameen of that District, dated the 22nd July 1862.

Brojo Rajkishoree (Defendant) *Appellant,*

versus

Bishonauth Dutt (Plaintiff) *Respondent.*

Mr. R. T. Allan for Appellant.

Baboos Mohesh Chunder Chowdry, Kali Kishen Doss, Dwarkanath Mitter, and *Upprokash Chunder Mookerjee* for Respondent.

The rule that, when an admission is relied on by a party to a suit as against his opponent, he must take the whole of the admission, does not apply to pleadings.

The attachment of a property is adverse possession causing limitation to run as against the party in possession of the property.

Jackson, J.—The plaintiff, Bishonauth Dutt, preferred this suit to recover possession of 4 chuks, Najamutpore, &c. Plaintiff alleged that these chuks formerly belonged to Parbutty Churn Mitter, who, on the 13th Cheyt 1251, mortgaged them, and subsequently on the 25th Cheyt 1253 sold them to the plaintiff; that plaintiff thereupon took possession of the chuks; that the defendant, Brojo Rajkishoree, the zemindar of the estate in which the chuks are situated, having obtained a decree for arrears of rent against Parbutty Churn Mitter in execution, put up three chuks for sale, and on the 24th Cheyt 1255 purchased them, and thereby ousted the plaintiff.

The defendant, Brojo Rajkishoree, declares that the alleged purchase was a mere paper transaction; that no possession was obtained by the plaintiff; that she had previously attached these chuks; and finally she rests her title to the chuks on her purchase at the sheriff's sale.

The Judge of the 24-Pergunnahs, on appeal from the Principal Sudder Ameen, has held that the purchase of plaintiff was made *bonâ fide,* and that defendant had full notice of it prior to her purchase in 1255, and that plaintiff's possession is proved. He has, therefore, confirmed the decision of the Principal Sudder Ameen, decreeing plaintiff's claim and title to recover possession.

On special appeal it is urged for defendant that the purchase by plaintiff is not proved; that the ikrar of 1253, under which the mortgage of 1251 is said to have been made absolute, has not been produced; that there is no proof that it has been lost as alleged; that there is no proof that any search has been made for it; that there has been no secondary proof given of the contents of this ikrar; that the plaintiff's title has consequently not been legally proved; and that the conclusion arrived at by the Judge, on the question of the possession of plaintiff immediately after her purchase upon which the question of limitation turned, is directly contrary to the evidence.

This suit was preferred on the 15th Sraban 1266. The plaintiff's title is founded on an ikrar dated 25th Jeyt 1253, and he admits dispossession on the 24th Cheyt 1255. It is shown that he has already on a former occasion sued in the Supreme Court to assert his title to these chuks as against the defendant, but on that occasion he elected a non-suit. It is not denied by the Judge that the defendant was in possession of the chuks in question in the year 1254, having attached them for rents due from Parbutty Churn Mitter; but the Judge considers that this attachment cannot be looked upon as an adverse possession.

As regards the absence of the ikrar, the Judge says that the original mortgage is in terms an absolute sale; that if the plaintiff's admission that it is a mortgage is relied on by the defendant, his whole admission must be taken, and the statement as to the ikrar must be taken to be good also.

On this point we think the Judge is wrong in law. It is true that, when an *admission* is relied on by a party to a suit as against

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his opponent, he must take the whole of the admission. But this rule does not apply to pleadings. The statements of a party in his plaint can be made use of by the opposite party as far as they assist his case, whereas those statements to which he objects must be proved. The plaintiff states that his title accrued, not on the deed which he states was a mortgage, though its terms are not those of a mortgage, but on an ikrar. The defendant raises objections to this ikrar. He raised objections to it so far back as the year 1254, as appears from a suit for arrears of rent preferred by the plaintiff in the Collector's Court in that year against some of the tenants of the chuks. The defendant then declared that the transfer was a mere fraudulent transactíon in fraud of creditors. The defendant then refused to give the plaintiff possession on this ground. In the year 1254 the plaintiff sought, by proceedings under Act IV of 1840, to recover possession of the chuks through the Magistrate, on the allegation of forced dispossession by the defendant. But on the 17th Assin 1254, the Magistrate held that plaintiff never had been in possession, and it is evident from other papers in the case that the possession of the plaintiff was disputed by the defendant in Magh 1253. The Judge overrules all this documentary evidence, and decides that the plaintiff was in possession on the evidence of certain ryots who, he states, lived on the land, and must therefore be, to some extent, under the influence of the defendant. All that these ryots depose is, in so many words, that the plaintiff purchased the chuks and took possession. We are of opinion that such evidence is utterly insufficient to rebut that contained in the documentary evidence. We could not, however, interfere on a finding of fact, but this finding is at the same time quite inconsistent with the Judge's finding that the defendant had previously attached the chuks. The Judge thinks this attachment was not an adverse possession. It may not have been adverse as against Parbutty Churn Mitter, but it was distinctly adverse as against the plaintiff. The record of the suit in the Collectorate proves that the defendant then declared the plaintiff's purchase to be a mere fraudulent transfer in fraud of creditors, and on that ground refused to give him up possession, and refused to allow him to collect rents. It was, then, as much an adverse possession as the defendant's present possession is. If then the Judge is wrong in law in the view he has taken of this possession, it may be that this error has caused an erroneous decision on the question of limitation, and we think it has. Looking upon this possession as adverse, the plaintiff was not in possession of the disputed chuks in 1254, and his suit is consequently barred by limitation. Plaintiff's cause of action upon the title which he now puts forward did not originate in 1255 but in 1253; and as he has delayed for more than 12 years to bring his action, his suit must be dismissed as barred by limitation. We accordingly reverse the Judge's decision, and dismiss this suit with all costs and interest.

The 28th June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Alluvial Land.

Case No. 3430 of 1863.

Special Appeal from a decision passed by Mr. T. Sandys, Judge of Dinagepore, dated the 10*th September* 1863, *affirming a decision passed by Mr. James Reily, Principal Sudder Ameen of that District, dated the* 17*th January* 1863.

Mr. Henry Maseyk and others (Defendants) *Appellants,*

versus

Mr. J. F. Hedger and others (Plaintiffs) *Respondents.*

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* for Appellants.

Mr. T. J. Fergusson and *Baboo Juggodanund Mookerjee* for Respondents.

Land gained by the gradual accession of a river, and added by the operation of nature to *A*'s tenure, must be held to be *A*'s property, although it be also established by evidence that this land has reformed on a site which was formerly part of *B*'s property. If it should be proved that the river flowed over the original site, and receding, left the new formation and a fordable channel between it and *B*'s property, *B* was entitled to re-take possession of the newly formed land on the old site, and he is not to be deprived of it now because the river should be either fordable on *A*'s side, or has become wholly dried up.

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Levinge, J.—THE question the Lower Courts had to decide, was whether the disputed lands belonged to the plaintiff's Mouzah Baboopore, or to the defendant's Mouzah Juggunnathpore. The land is depicted on the map of the Ameen, and is admitted to lie within the beds of two rivers, one on the east, the other on the west. A considerable portion, if not the whole, of the original site of the present formation, clearly appears to have been part and parcel of the defendant's Mouzah Juggunnathpore. The river (Ganges) was the boundary of the two estates, and by its action had diluviated the site of the disputed land. This river formerly ran to the east of the disputed land, but, apparently some time in or about 1267, altered its course, and now runs to the west, on the opposite side of the property in dispute, thus apparently detaching it from defendant's mouzah. The result of this change in the river has been to cause a reformation of land on its original site, but leaving the river (which had been formerly the boundary of the two estates) to the west of the reformation. On the strength of this state of things, the plaintiff sued the defendant to obtain possession, alleging that the lands were *an accretion* to his estate of Baboopore, the *onus* lying on the plaintiff to make out his case; whereas the defendant contended that the lands belonged to him, asserting that they had reformed on their original site, and, therefore, belonged to him as part of his mouzah, and that he took possession of the land on its reformation.

The first Court has given a careful judgment, has reviewed the evidence, and has found, as a fact, that the disputed property belonged to the plaintiff as *an accretion* to his mouzah. On appeal to the Judge, the decision has been upheld, *but upon another ground.* The property in dispute contains 546 beegahs of valuable land; the defendant is in possession, and has apparently established the fact that this land has reformed on his original property; and we see that the case required much care and reflection, before the Judge in appeal decided it; and yet the following appears to be his only recorded reasons for upholding the decree. We set out the judgment *in extenso*:—

"The map of the chur, as it was to be seen in 1861, when it first formed, filed by appellant himself, shows that, on the side next to plaintiff's land, the stream was fordable, which is exactly what plaintiff himself asserts, and on this fact found his claim. The statements of appellant's witnesses to the effect that on that (*i. e.* east) side of the chur, the Ganges ran at the time the chur was formed, cannot be believed, and the appeal is, therefore, dismissed with costs against appellant, and the order of the Lower Court affirmed."

We consider this judgment wholly insufficient, and we are enabled, on this special appeal and for the reasons we shall presently give, to send the case back to the Judge for further consideration and for a more perfect judgment.

It will be at once seen that the Judge has affirmed the decision of the Lower Court on wholly different grounds to that taken by the Court of first instance; for, whereas the first Court found on the evidence that the lands were an accretion to the plaintiff's estate and awarded them to the plaintiff under the provisions of the 1st Clause of the 4th Section of Regulation XI of 1825, which declares that lands gained by the gradual recession of a river shall be considered to be an increment to the tenure of the person to whose land it is annexed, yet, the Judge, Mr. Sandys, has given them to the plaintiff, because the river which separated the plaintiff's mouzah from the disputed land was *fordable*, acting on the rule laid down in the 3rd Clause of the same Section. Now this is giving to the plaintiff the disputed property in a different right to what he claimed it, and upholds the judgment of the first Court for a different reason, and is, in our opinion, wholly defective as a legal judgment. Observations have been made on this judgment, which we consider quite warranted, and we think the defendant has good cause to complain of the summary way his claim has been disposed of, and his alleged title to 546 beegahs of land, of which he is in possession, has been dealt with. On special appeal this judgment seems to us to be clearly open to question, and after hearing this case discussed for a lengthened period, we are compelled to remand it to the Judge for further consideration.

The first Court has held that the land accreted to the plaintiff's estate. But it does not appear clear from that judgment whether that accretion was caused by the *gradual* recession of the river or not. There are some passages in the judgment that might warrant that inference; and it is possible, in law, that that judgment might be upheld on special appeal; but such is not the case with

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the judgment appealed against. The defendants contend, and fairly contend that, although it is possible and may be true that the river between the plaintiff's land and the chur in dispute was fordable, yet so was the stream between their main land and the chur, and this is proved by the Ameen's map on which both Courts rely; and, therefore, according to that argument and evidence, they are just as much entitled to it as the plaintiff, or more so, as the land is a reformation on the old site of their land, and that, as soon as it reformed, they went into possession and have never left it. Certainly, the Ameen's map given in evidence and acted on, shows that the river now running between the disputed chur and the defendants' mouzah is only in parts 2 feet deep, and the Ameen's report, set out in the judgment of the first Court, might be fairly referred to as establishing such a case for the defendant; for it is found as a fact that the "*river flowed more or less on the east and west of the lands.*" The mere fact that at this time more water flows to the west of the chur or wholly on that side, does not, *of necessity*, legally cause the land to be an increment to the plaintiff's tenure, as found by the first Court; for when this chur became capable of being taken possession of, the channel between it and the defendant's land may have been fordable. If so, and as it appears to be a reformation on its original site, then the defendant would have been justified in taking possession of the land, although the plaintiff could have forded the stream to it, or gone over the old dried bed of the river on to the disputed chur land. But it is impossible to reconcile *the two judgments*, for the first Court has found the land as an *increment* to the plaintiff's mouzah by reason of the river having wholly gone over from its old course to the west of the chur, whereas the Appellate Court gives the land to the plaintiff, because the river on the east or side next to the plaintiff's mouzah became *fordable*. That, in short, is treating the chur as an island, and annexing it to the plaintiff's mouzah, because the river had become fordable next to the plaintiff's tenure, which was not his own case.

We observe from the epitome of the pleadings, &c., in the handwriting of the Principal Sudder Ameen (Mr. Reily) that the plaintiff alleges the reformations began in Assin 1268, and the defendants say they wholly reformed in 1267, when they took possession. From the circumstances of both parties agreeing so nearly as to the date of the reformation, it may be fairly predicated that whatever are the true state of facts connected with the reformation, the alteration was rapid in its character and of recent occurrence, and, consequently, capable of a clear elucidation. When this shall have been effected after a careful investigation, the application of the law will not be difficult. We consider ourselves justified in saying that, if the Judge finds that the river deserted its old bed to the east and gradually receded to the west, and during this operation left land between it and the old bed, which was the boundary of the two mouzahs, this land, so thrown up on the gradual recession of the river, may be legally held to be an increment to the plaintiff's mouzah, although the newly formed land should, in point of fact, be clearly established to have reformed on its old site—that old site having formerly belonged to the defendant.

We think on the true construction of Regulation XI of 1825, that lands gained by the gradual recession of a river and added by the operation of nature to the tenure of *A*, must be held to be the property of *A*, although it be also established by evidence that this land has reformed on a site which was formerly part of the property of *B*. If it should be proved on the evidence that the river flowed over the original site, and receding, left the new formation and a fordable channel between it and the defendant's Mouzah Juggunnathpore, the defendant, in our opinion, was justified in re-taking possession of the newly formed land on the old site, and he is not to be deprived of that possession now, *because the river should be either fordable* on the plaintiff's side, or has become wholly dried up.

With these remarks we remand the case to the Judge, requiring him again to take it up; receive any legal evidence either party may consider it to be their interest to adduce; and within the true spirit of the provision regulating the duty of Appellate Courts laid down in the 359th Section of Act VIII of 1859, give his decision on the evidence proved, and the reasons for that decision. It is possible that this case may again come before this Court in appeal, or may go to a full Bench of Judges, and unless the facts are clearly found, and found on some evidence, and that evidence referred to by the Lower Court, great embarrassment must ensue, and further expense, if not injustice, may be caused to one side or the other.

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The 28th June 1864.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Contribution (Government Revenue)—Onus probandi.

Case No. 3205 of 1863.

Special Appeal from a decision passed by Mr. A. W. Russell, Officiating Judge of Behar, dated the 9th August 1863, *modifying a decision of Baboo Taruck Nath Bidyasagur, Principal Sudder Ameen of that District, dated the 28th February* 1862.

Aghoree Ram Sahoy and others (Defendants) *Appellants,*

versus

Ramolee Sahoo and others (Plaintiffs) *Respondents.*

Baboo Kissen Succa Mookerjee for Appellants.

Baboo Kally Kissen Sein for Respondents.

In a suit to recover the amount of excess payments of Government revenue made by the plaintiffs on account of their co-sharers to save the estate from sale (each proprietor holding a well defined, though not actually separated, share),—HELD that the *onus* was on the plaintiffs to prove their shares and the amount of revenue payable on them.

Glover, J.—THIS was a suit to recover the amount of excess payments of Government revenue made by the plaintiffs (special respondents) on account of their co-sharers to save the estate from sale.

The defendants, special appellants in this case, do not deny that the special respondents have paid the sums alleged, but aver that the jummas of some of the villages composing the estate have been wrongly calculated, *viz.*, that on the village of Mukkur Bhowanee which is in the special respondent's khas possession, the rent is stated to be Rs. 106, whereas it should be Rs. 128, and that in special appellant's village of Koliaba, the proper rent of which is Rs. 5 odd, special respondent has fixed a jumma of Rs. 21.

Both the Lower Courts gave special respondents a modified decree. The plaintiffs were dissatisfied with the Principal Sudder Ameen's decision, and appealed to the Judge, who gave them more favorable terms, and it is the defendants in the original suit who now appeal specially to this Court.

It is urged before us—

1*st.*—That the *onus* has been laid improperly, it being the special respondents' business to prove their shares, and the amount of revenue payable on them.

This objection appears to us valid. It is not denied that the estate in question was divided amongst the sharers in distinct lots. Special respondents for instance seem to have held entire possession of one village and of shares ranging from 1 anna to 4 annas in the others. Similarly, special appellants held the entire village of Koliaba with portions of others. Under these circumstances a plaintiff coming into Court with a demand for reimbursement of excess payment of rent, is bound in the first instance, to show wherein that excess payment consisted. Had the estate been "ijmallee," in the strict sense of the term, all that the special respondent would have had to do would have been to prove that he had paid more than a certain proportion ; but, here, each proprietor holds a well defined, though not actually separated, share, and it is on the rent due on their specific shares that the dispute has arisen. Special respondent was charged by the other side with decreasing his own liability on the village of Mukkur Bhowanee from Rs. 128 to Rs. 106, and adding the balance payable by him on that account to the jummas of his co-sharers in respect of the village of Koliaba.

It appears to us that all the difficulties in this case and the complicated statements of accounts also, would have disappeared at once had the Lower Courts taken the very simple yet obvious course of applying to the Collector for information. The contention is in reality narrowed to one point, *viz.*—"What is the jumma of Mukkur Bhowanee and of Koliaba ?" This information can readily be come at by applying to the Collector, and on having it, the matter in dispute would be cleared up, without having to wade through masses of figures, the accuracy of which is denied by either party in turn. If the rent of Mukkur Bhowanee is Rs. 128 and not Rs. 106, the special respondent has paid nothing in excess, and is entitled to recover nothing.

Whether the required information be obtainable or not from the Revenue Court, the parties themselves must prove the amount of their shares of the aggregate jumma. This order has reference only to the parties now before the Court.

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The 28th June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Hindoo Law — Sale in execution of decree against father — Suit by Son—Onus probandi.

Case No. 3434 of 1863.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 27th July 1863, *affirming a decision of the Principal Sudder Ameen of that District, dated the 24th March* 1863.

Beer Persad and others (Plaintiffs) *Appellants,*

versus

Doorga Persad and others (Defendants) *Respondents.*

Baboos Romesh Chunder Mitter and *Kissen Succa Mookerjee* for Appellants.

No one for Respondents.

A sale in execution of a decree against a father can only be set aside by the son when the debt was contracted for an immoral purpose, the *onus* of proving the immorality being on the son.

Levinge, J.—THIS is a suit brought to set aside a sale had under a decree obtained against the plaintiff's father on the allegation that such sale was void under the Mithila Law. Both Courts have dismissed the plaintiff's case, the Lower Appellate Court holding that "there is no law or precedent by which a Hindoo can set aside sales made in execution of decrees of Court." The Court of first instance dismissed the plaintiff's case, holding "that the sales have taken place by the intervention of the Courts in execution of decrees and not privately executed, and agreebly to the Sudder Decision dated the 8th June 1861, and Macnaghten's Hindoo Law, the plaintiff's claim in respect of the property sold cannot be supported." On looking at the above case, it will be found that the Judges rule "that the sales for the reversal of which the present suit is brought, divide themselves into three classes—1st, *sales made by order of Court in execution of decrees,*" &c., and then they go on to rule that sales made in execution of decrees can only be set aside when the debt was contracted for an *immoral purpose.* Proof of mere extravagance will not enable the son to succeed. The immorality must be clearly proved, and it must be immorality "repugnant to good morals in the Hindoo sense of the term." Sudder Decision, 8th June 1861.

We must therefore remand the case to the Judge to try that issue, remarking that the *onus* lies on the plaintiff to prove that the debts were contracted for an immoral purpose.

The 29th June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Hindoo Widow — Sale—Maintenance.

Case No. 3440 of 1863.

Special Appeal from a decision passed by Baboo Greesh Chunder Ghose, Principal Sudder Ameen of the 24-Pergunnahs, dated the 31st August 1863, *reversing a decision of the Moonsiff of Baraset, dated the 5th February* 1863.

Anund Moyee Goopta and others (Defendants) *Appellants,*

versus

Gopal Chunder Banerjee (Plaintiff) *Respondent.*

Baboo Gopeenath Mookerjee for Appellants.

Baboos Unnoda Persad Banerjee and *Greesh Chunder Ghose* for Respondent.

A Hindoo widow's claim to maintenance upon an estate does not necessarily render the sale of the property subversive of her right, for even if there be no other property out of which that maintenance can be derived, there is nothing to prevent her from suing to establish her right to make her maintenance a charge upon the property sold.

Steer, J.—THE plaintiff having purchased the property sued for from Dwarkanath, who represents himself as the heir of Bycunt and Neelcunt, brings this suit for possession, against Anund Moyee by whom he is kept out of possession.

Anund Moyee's defence was that the plaintiff had purchased the property from Dwarkanath who had no right to sell it.

It has been held by the Court of Appeal below that Dwarkanath is the heir of Neelcunt and Bycunt, and that the purchase of the plaintiff from him is valid.

It is contended for Anund Moyee in special appeal that, as she has a right of maintenance out of the property, its sale is not valid. But this was not her case as made in the Lower Court, and if she is entitled to maintenance, she can sue for it. But her claim of maintenance does not necessarily

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render the sale of the property in suit subversive of her right, for there may be other property in the hands of Dwarkanath, out of which that maintenance can be derived; and even if there is no other, there is nothing to prevent her from suing to establish her right to make her maintenance a charge upon the property purchased by the plaintiff. That point, however, cannot be taken into consideration in the present suit, the sole issue in which was, as the defence was drawn up, whether Dwarkanath was the heir, and, as such, entitled to convey a legal title to it in favor of the plaintiff. The special appeal is accordingly dismissed with costs.

The 30th June 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Pre-emption.

Case No. 433 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 21st of November 1862, reversing a decision of the Moonsiff of Aurungabad, dated the 9th December 1861.

Sheo Tuhul Singh and others (Plaintiffs) *Appellants,*

versus

Mussamut Ram Kooer and another (Defendants) *Respondents.*

Baboo Greesh Chunder Ghose for Appellants.

No one for Respondents.

A person having been offered his right of pre-emption and having refused it, cannot afterwards re-assert that right as against a sale made with his direct permission to a third party.

Jackson, J.—This was a suit to reverse a sale between the defendants on the assertion of a right of pre-emption.

The Principal Sudder Ameen on appeal has found that the property was offered in sale to the plaintiff and was refused by him, and with his permission was then offered and sold to other parties.

It is said that, notwithstanding this, the plaintiff can claim a right of pre-emption, but no authority is quoted to that effect; and we are of opinion that the plaintiff, having been offered his right and having refused it, cannot afterwards re-assert that right as against a sale made with his direct permission to a third party.

Appeal dismissed with costs.

The 30th June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Execution of money-decree — Subsequent purchaser.

Case No. 3480 of 1863.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 16th September 1863, affirming a decision of the Principal Sudder Ameen of that District, dated the 21st May 1863.

Ramnath Ram (Plaintiff) *Appellant,*

versus

Deen Dyal Ram (Defendant) *Respondent.*

Baboos Chunder Madhub Ghose and *Khetter Nath Bose* for Appellant.

Baboos Tarucknath Sein, Unnoda Persad Banerjee, and *Mohesh Chunder Chowdhry* for Respondent.

* *Quære.*—Whether the holder of a simple money-decree can follow the property stated in the bond to have been previously pledged to him by the debtor in security for the bond debt, after the conveyance of such property to another party.

Steer, J.—It seems to be established that Agoree Ram was indebted to several different parties. He owed money to Muttora Lall, to Hera, and to the plaintiff.

In execution of Muttora Lall's decree, Agoree Ram's property, the village of Khoolharia, was attached and sold. It was bought by Deen Dyal with notice that the plaintiff claimed to have a lien upon it.

The same property was again sold to satisfy the claim of one Hera. He, it is supposed, must have been judicially declared to have held a lien upon the property prior to Deen Dyal's purchase. The sale satisfied Hera's lien, and there remained a surplus.

The question is,—To whom does this surplus belong?

Deen Dyal was the first purchaser. By his purchase he stood in respect to the rights and interests of Agoree Ram, the debtor, as that individual stood; and *primâ facie* the surplus money realized by the second sale belongs to him. He might have paid off Hera and have kept the property; but he allowed the property to be sold, and the money brought by that sale represents now what remains of the estate.

It may be that the plaintiff, who avers that he held a lien upon the property prior

* *Note.*—This question has since been decided in the negative by a Full Bench. *See* 1 Weekly Reporter, p. 315.

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to the purchase by Deen Dyal, may have an equitable claim against Deen Dyal; but he has not established that at present, and he has no right therefore to money belonging to Deen Dyal. He obtained a simple money decree against Agoree Ram; and it is a question yet to be decided whether, in right of that decree, he can follow the property after its conveyance to another party, merely because it is stated in the bond to have been previously pledged to him by Agoree Ram in security for the bond debt. The money realized at the second sale represents the property; and to hold that the plaintiff is entitled to that, is to hold that Deen Dyal is liable out of that property, and as far as it can be made available, to pay Agoree Ram's debt to the plaintiff upon the bond. That we cannot do in this suit; and we must, therefore, declare that the plaintiff has not established his right to the money he claims. In this view we dismiss his special appeal with costs.

The 30th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Enhancement — Service of notice — Declaratory decree.

Cases Nos. 3284 and 3286 of 1863.

Special Appeals from a decision passed by the Judge of the 24-*Pergunnahs, dated the* 31*st August* 1863, *reversing a decision of the Moonsiff of Manicktollah, dated the* 23*rd September* 1862.

Ishur Chunder Mundul (Plaintiff) *Appellant,*

versus

Sham Chund Dass and others (Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Prosunno Coomar Bose for Respondents.

A decree declaratory of the plaintiff's general right to enhance on future service of notice may be passed in a suit under Regulation V. 1812, where the plaint was for enhancement at a certain specified rate, and in which service of notice was held to be not proved.

Glover, J.—This was a suit by the special appellant (plaintiff in the Courts below) to recover enhanced rent on certain land held by the special respondent after notice served under the old law, Regulation V of 1812. The defendant pleaded *inter alia* that notice had not been served, and that he did not hold the quantity of land stated by the special appellant.

Both Lower Courts found that the service of notice was not proved; but the Moonsiff gave special appellant a decree for enhanced rent, payable from the date of service of notice; whilst the Judge held that no notice having been served, and the suit not having been brought for a declaratory right to enhance, but for actual enhancement at a specified rate, the case fell to the ground, and that no order of enhancement could be passed.

The question before us is, Can a decree declaratory of the special appellant's right to enhance on future service of notice be passed in a suit where the plaint was for enhancement at a certain specified rate, and in which service of notice was held to be not proved?

The precedents of this Court which apply to this case are those of the 12th February 1863, Mr. H. Paulson *vs.* Muddhoosoodhun Paul Chowdry, and the 13th May 1858, Joy Kissen Mookerjee, *vs.* Sheikh Kazee Golam Sufdar,—wherein, after some discussion, it was ruled that, although notice be not served, a decree can be given for a particular sum of enhanced rent, although that sum cannot be realized until notice is served.

So far, therefore, that is to say, on the principle on which the case was decided, the Moonsiff was right, and the Lower Appellate Court wrong.

But it is further contended in special appeal that, in cases where the quantity of land is in dispute, the question of enhancement cannot be adjudicated upon (*vide* High Court's Decisions for March 1863, p. 376.) We think that this refers to the actual fixing of a rate of enhancement, and not to a declaration of a right to enhance. The two questions depend manifestly on entirely different premises; and although a dispute regarding the amount of land in a ryot's possession is a very good reason why a specific amount of enhanced rent should not be fixed upon him, it is no reason at all for refusing to adjudicate the general question, whether he is liable to have his rent enhanced.

We are of opinion, therefore, that this appeal should be decreed, and that the special appellant should have a decree declaring his general right to enhance.

Special appeal No. 3286 is admitted to be on all fours with this case. The same order is therefore passed.

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The 30th June 1864.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Title (Invalidation of—once declared) — Sale of decree — Right of judgment-debtor to contest purchaser's right.

Case No. 3236 of 1863.

Special Appeal from a decision passed by Mr. F. C. Fowle, Judge of Rungpore, dated the 30th July 1863, reversing a decision passed by Syud Imdad Ali Khan, Principal Sudder Ameen of that District, dated the 11th January 1862.

Sunnooburnessa Khanum and others (Plaintiffs) *Appellants,*

versus

Meher Chund (Defendant) *Respondent.*

Baboo Kissen Succa Mookerjee and *Moulvie Murhumut Hossein* for Appellants.

Baboos Sreenath Doss and *Kissen Dyal Roy* for Respondent.

A title once declared valid cannot afterwards be attacked on other grounds which are not newly discovered, but which were available and might have been taken when the former suit was under trial.

If *A* has sold his decree to *B* and ratified it by his own admission in Court, it is not for the judgment-debtor to contest the right of the purchaser to execute it; his only valid plea would be payment to the original decree-holder.

Loch, J.—SULEEMOLLAH got a decree against Abed Ali; and his heirs, on the 11th June 1851, sold it to Meher Chund.

Meher Chund tried to execute the decree, but was met by the heirs of Abed Ali, who alleged that the money had been paid, and that the sale was informal, as the transfer on the back of the decree had not been stamped.

After much litigation of a miscellaneous character, the Judge threw out Meher Chund's application for execution, on the ground that the execution was barred by lapse of time. Meher Chund instituted a regular suit to set aside this miscellaneous order, and obtained a decree, which was confirmed in appeal on the 25th July 1858. In that case he made the present special appellants parties to the suit, and they had then every opportunity of attacking the validity of his title and bringing the same objections against it which they have now done. The special appellants now sue to set aside the sale of the decree on the ground that the deed of sale is a forgery; to set aside the sale of certain lands sold by Meher Chund in execution of his decree; and to recover mesne profits.

The history of this case, as recited by the Judge, is an example of the manner in which a decree-holder may be badgered by unscrupulous judgment-debtors. Since 1851 the decree-holder has been wading through litigation. He purchased the decree from the heirs of the original holder; the debtors resist; the vendors who are related to them collude and deny the sale, and then are obliged to admit it; the decree-holder's title is declared a forgery; pleas of payment are advanced; and when the decree-holder thinks he has cleared off all further opposition, he finds the Law of Limitation effectually pleaded against him. He has to plunge into fresh litigation to set this order aside, and gets a decree, and when that order is confirmed in appeal, attaches and sells some property which he purchases, and no sooner takes possession than he is ousted, and has to bring a fresh suit for possession; while the debtors, determined not to leave him in peace, bring the present regular suit determined to put the question of his title once more in issue. In framing the issues, the Principal Sudder Ameen has imported matters not in question between the parties, from whose written statements he alleges that he has gathered it; and among the points fixed for trial by him was, *first*, whether the endorsement transferring the decree to Meher Chund was collusive; and, *secondly*, whether the bill of sale were a forgery, and he finds in the affirmative on both points. The Judge holds the endorsement to be valid; and as the title of Meher Chund to execute the decree rests upon that endorsement and not on the deed of sale, it is of little consequence whether it be proved to be genuine or not. He does not pronounce any distinct opinion upon this point of forgery, but we gather from the general terms of his decision that he differs from the opinion come to by the Lower Court.

We think, however, looking at all the circumstances of the case, that plaintiffs have no right to bring the present action. When the regular suit was brought by Meher Chund, the present plaintiffs were the defendants. The validity of Meher Chund's title to execute the decree was then put in issue, and the defendants did then question it and objected that the transfer was informal from defect of stamp. That defect had been rectified, and their objection was overruled. They had on that occasion opportunity given

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them to bring the objections to the validity of his title which they do now. They neglected to do so, and they cannot, after his title has been declared valid, again attack it on other grounds which are not newly discovered, but which were available and might have been taken when the former suit was under trial. Again, for another reason, we think that they are not in a position to attack his title. They are debtors so long as they have not paid. It is really a matter of secondary importance whether *A* or *B* be considered entitled to the money. If *A* has sold his decree to *B*, and ratified it by his own admission in Court, it is not for the judgment-debtor to contest the right of the purchaser to execute it. His only valid plea would be payment to the original decree-holder. We therefore dismiss the appeal with costs.

The 30th June 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Execution—Service of notice—Presumption.

Case No. 2783 of 1863.

Special Appeal from a decision passed by Mr. W. Wright, Principal Sudder Ameen of Rajshahye, dated the 3rd July 1863, affirming a decree of Moulvie Ali Hyder, Moonsiff of Pubna, dated the 25th July 1862.

Kasee Kant Talookdar (Plaintiff) *Appellant,*

versus

Gopal Kisto Moitro and others (Defendants) *Respondents.*

Baboo Onookool Chunder Mookerjee for Appellant.

Baboo Greeja Sunker Muzoomdar for Respondents.

In a case of execution of decree of 12 years' standing, the defendant is not bound to prove service of notice, but the Court may presume that notice has been regularly served, unless the party alleging irregularity can produce evidence to the contrary.

Jackson, J.—The ground of special appeal is that the Lower Court did not require defendant to prove service of a notice in an execution of decree case of twelve years' standing, but presumed that notice had regularly been served, unless the party alleging the irregularity could produce some evidence to the contrary. It is said that the plaintiff was thereby required to prove a negative.

We think the Lower Court correctly applied the presumption of law upon this point, and held that the usual notices were served, unless some evidence could be produced to the contrary. The plaintiff could give no such evidence, and his suit grounded on this alleged irregularity was properly dismissed.

This appeal is dismissed with costs.

The 30th June 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Hindoo Law of Inheritance — Unbegotten heir.

Case No. 1613 of 1863.

Special Appeal from a decision passed by Baboo Gobind Chunder Chowdry, Principal Sudder Ameen of Beerbhoom, dated the 19th November 1862, reversing a decision of Baboo Denonath Chatterjee, Moonsiff of that District, dated the 21st February 1862.

Koylasnath Dass and others (Plaintiffs) *Appellants,*

versus

Gyamonee Dossee and others (Defendants) *Respondents.*

Baboos Bhoobun Mohun Roy and *Luckhee Churn Bose* for Appellants.

Baboo Banee Madhub Banerjee for Respondents.

An inheritance cannot remain in abeyance for an unbegotten heir (such not being a posthumous son). The succession must vest in the heirs existing at the time of the death of the person whose inheritance descends.

Seton-Karr, J.—It is admitted that in this case the birth of the sister's son, defendant in this case, was taken in both the Courts as having occurred after the death of the maternal uncle. The plaintiff clearly specified the date of the birth of the child as 7 years posterior to the child's

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uncle's death. The defendant took no objection to this allegation, and the law point, which was decided by both the Courts differently, turned on this fact as one which was not questioned.

The law point, then, is whether an inheritance can devolve on a sister's son not born at the time of his maternal uncle's death, or whether it must not at once vest on the heirs existing at the time.

Now, after hearing both parties and examining the precedents quoted on both sides, we are of opinion that the decision of the Principal Sudder Ameen is not sound in law. The rule in a precisely similar case, and in such cases generally, is clearly laid down in a decision of the late Sudder Court, page 340 of 1860. On principles of Hindoo Law, as well as on general legal principles, it is there laid down that an inheritance cannot remain in abeyance for an unbegotten heir, such not being a posthumous son, and that the succession must vest in the heirs existing at the time of the death of the person whose inheritance descends.

The case reported at page 231 and following of the 6th Vol. of the Selected Reports, has been misquoted. The authority relied on by the Principal Sudder Ameen is the mere *dictum* of a Pundit, and the decision itself shows that the Court then held the very doctrine which was held by the later Court in 1860.

Such being the case, we have no hesitation in reversing the decision of the Principal Sudder Ameen, and in restoring that of the first Court, which is quite legal and correct, with all costs.

The 30th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Special Appeal—Re-admission of Appeal.

Case No. 3282 of 1863.

Special Appeal from a decision passed by Mr. R. Thompson, Judge of Nuddea, dated the 29th August 1863, reversing a decision of Baboo Bistoo Chunder Banerjee, Moonsiff of that District, dated the 16th April 1862.

Kisto Persad Dutt (Plaintiff) *Appellant,*

versus

Mr. T. A. Cowie (Defendant) *Respondent.*

Baboos Sreenath Sein and *Nil Madhub Ghose* for Appellant.

No one for Respondent.

No special appeal lies to the High Court from the order of a Judge refusing to re-admit an appeal dismissed for default by a Principal Sudder Ameen. The application for re-admission should be made to the Principal Sudder Ameen.

Glover, J.—This is an appeal from the Judge's order refusing to re-admit an appeal. It appears from the record that, in a suit instituted before the Moonsiff of Kooshea, special appellant in this case, who was then the plaintiff, obtained a decree. The other side appealed, on which special appellant, as respondent, appointed a vakeel to look after his interests. The appeal was, for some reason or other, transferred to the Principal Sudder Ameen of Meherpore, and the respondent not appearing there, the case was heard in his absence, and decreed *ex parte* in favor of the appellant.

Special appellant then applied to the Judge of the district to have his appeal re-admitted, on the ground that when the case was transferred to the Principal Sudder Ameen at Meherpore, no notice of the change had been

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served upon him, and that he was ignorant of the transfer. The Judge rejected his application, and against this order the present special appeal is preferred.

We are of opinion that this appeal does not lie. Special appellant ought, if he felt himself aggrieved by the decision of the Principal Sudder Ameen, to have applied to that officer to have his appeal re-admitted, and not to the Judge, who had no power to entertain the petition; or the special appellant might have appealed direct to this Court. But he waited nearly a whole year after the Principal Sudder Ameen's adverse decision, before doing anything, and then applied to the wrong Court.

We think, therefore, that this application should be dismissed with costs, on the ground that the special appellant acted wrongly in bringing his petition before the Judge who had no jurisdiction in the matter. Taking this view of the case, it is unnecessary for us to consider the grounds of the Lower Court's decision.

The 30th June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell,

Judges.

Sale—Limitation—Supplemental Pla'nt.

Case No. 1967 of 1863.

Special Appeal from a decision passed by Baboo Gobind Chunder Chowdhry, Principal Sudder Ameen of Beerbhoom, dated the 15th April 1863, affirming a decision passed by the Moonsiff of Gopalpore, dated the 21st August 1862.

Nundo Gopal Roy (one of the Defendants)

Appellant,

versus

Jankeeram Chuckerbutty and others (Plaintiffs) and others (Defendants) *Respondents.*

In a suit to set aside an auction sale made before the passing of Act VIII of 1859, where the recorded purchaser was made a defendant by a supplemental plaint after the period of limitation had expired,—HELD that the date of the supplemental plaint was, for purposes of limitation, to be taken as the date of suit as against the recorded purchaser, and that the plaintiff was out of time as against him. But as the plaintiff had asserted that the recorded purchaser was the nominal purchaser, and the original defendant the real purchaser, the case was remanded for a decision on that point.

Campbell, J.—THE point in this case is a peculiar one. Plaintiff instituted a suit to set aside an auction sale within the period of limitation but did not make the present special appellant a defendant. After the period of limitation had expired, finding that the special appellant was the nominal purchaser, he made him a defendant by a supplemental plaint. Special appellant urges that, as against him, the supplemental plaint is, for purposes of limitation, to be taken as the date of suit, and that plaintiff is out of time. Ordinarily, we must consider that this is so, and if respondent cannot show that he had any reasonable grounds for substituting one defendant for another, or that there was any fraud or concealment, but on the contrary, special appellant was all along the recorded and real purchaser, we think that plaintiff having failed to attack the appellant's title under his purchase within the period of limitation the suit as against him would be out of time. Plaintiff asserts that Jankeeram, the orginal defendant, was the real purchaser, and special appellant the nominal purchaser. We remand the case for decision on this point. If, from the evidence on both sides, it appears that Jankeeram was the real purchaser, the decree will stand; if not, plaintiff will be out of Court under the Law of Limitation, and cannot have a decree against Nundo Gopal.

The sale, we observe, took place before the passing of Act VIII of 1859, and the case is not affected by Section 260 of that Act.

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The 30th June 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Pre-emption (Hindoos).

Case No. 256 of 1863.

Special Appeal from a decision passed by Moulvie Syud Ahmed Buksh Khan Bahadoor, Principal Sudder Ameen of Sylhet, dated the 20th November 1862, reversing a decision of the Moonsiff of that District, dated the 17th April 1862.

Ramgutty Surma (Defendant) *Appellant,*

versus

Kasi Chunder Surma and others (Plaintiffs) *Respondents.*

Baboo Greesh Chunder Ghose for Appellant.

Baboo Kedarnath Chatterjee for Respondents.

Pre-emption is not a right to be found in any Hindoo Law Book, but was allowed and practised by custom in some parts of the country. Before the right can be claimed, the plaintiff must prove the existence of the custom in the district where the property is situate.

Jackson, J.—This was a suit for recovery of moveable and immoveable property, founded on a right of pre-emption.

The issue laid down by the Moonsiff, on the defendant's pleadings, was whether the right of pre-emption existed as a custom in the District of Sylhet. The Moonsiff decided against the custom.

On appeal, the Principal Sudder Ameen reversed the Moonsiff's decision, on the ground that pre-emption was customary among the Hindoos of Hindoostan and Bengal generally.

This question was very fully argued in a late trial before the Full Bench of this Court, a it was held that pre-emption is not a right to be found in any Hindoo Law Book, but that in some parts of the country such right was allowed and practised by custom.* Before, then, plaintiff can claim this right, he must prove that this custom exists; not in Hindoostan, but in Sylhet. The Moonsiff very properly decided this question. The Principal Sudder Ameen did not, and as this objection is raised to his judgment, his decision must be reversed, and the case remanded to him for a proper decision upon the special custom in Sylhet.

The 30th June 1864.

Present:

The Hon'ble H. V. Bayley and Sumboonath Pundit, *Judges.*

Valuation of claim.

Case No. 3061 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 14th August 1863, reversing a decision of the Moonsiff of Buxar, dated the 31st January 1863.

Sheo Golam Singh (Plaintiff) *Appellant,*

versus

Bejoyram Protab Singh (Defendant) *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Kally Kishen Sein for Respondent.

Where a plaintiff only sues for declaration of his title to certain lands on reversal of the kobalas said to

* *See* Sutherland's Full Bench Rulings, p. 143.

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have been illegally executed by his father, he need not be compelled to value the case at the total of the consideration mentioned in those deeds.

Pundit, J.—THE Lower Appellate Court appears to have calculated the valuation of this claim on a wrong principle. The object of the suit, and therefore the subject matter of the plaint, was to have it tried that the plaintiff's father had no right to alienate the ancestral property. It is admitted that the plaintiff had sued for immediate possession of these ancestral lands on certain kobalas executed by his father. The valuation of the case would have been the same as that adopted by the plaintiff in the present case. As the plaintiff can and therefore has only sued for declaration of his title to these lands on reversal of the kobalas said to have been illegally executed by his father, he need not be compelled to value the case at the total of the consideration mentioned in these deeds. We accordingly reverse the decision of the Lower Appellate Court, and remand the case to that Court that it may try the merits of the defendant's appeal.

The 30th June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Husband and wife — Principal and Agent.

Case No. 3476 of 1863.

Special Appeal from a decision passed by Mr. L. W. Hutchinson, Acting Principal Sudder Ameen of East Burdwan, dated the 18th September 1863, modifying a decision of Baboo Kedarnath Banerjee, Sudder Moonsiff of that District, dated the 27th November 1862.

Mooradee Bebee (Plaintiff) *Appellant,*

versus

Sheik Syefoollah and others (Defendants) *Respondents.*

Mr. A. F. Lingham for Appellant.

Baboo Kissen Succa Mookerjee for Respondents.

Where a husband allowed his wife to have control over certain property and to mortgage it,—HELD that she must be considered in fact to be his agent if he was really the principal, and that he was bound by her act.

Levinge, J.—IN this case the plaintiff was a mortgagor who foreclosed the land sued for, and in this suit seeks to be put in possession. The mortgagees were three Mahomedan females, sisters, Bunnoo, Mochee, and Munnee. In both Courts plaintiff was successful in recovering the ⅔ shares mortgaged by Bunnoo and Moochee The first Court also gave him a decree for the shares mortgaged by Munnee, but the Lower Appellate Court reversed that decree on the ground that Munnee was married to one Kurreem Bux, and that the ⅓ share belonged to him in right of purchase although bought in the name of his wife, who was found by the first Court to be in possession, with her two sisters, of the whole property. The Lower Appellate Court held that Munnee had no power to mortgage, and upheld the sale by Kurreem Bux to the defendant, Sheikh Syefoolah.

We are of opinion that this finding must be reversed, as it cannot be allowed that property is to remain in the name of a wife and she be permitted to deal with it, mortgage it, receive the proceeds, and then the husband to be allowed to come forward and defraud the mortgagee by disputing his wife's title; or by selling it to a stranger, put another person in a position to do what he cannot be allowed to do himself. In this case it is possible, though not at all probable, that Kurreem Bux bought the ⅓ share of the property in the name of his wife. Although the remaining ⅔ is held by her two sisters, Mahomedan ladies, still even assuming the ⅓ share to have been *bonâ fide* purchased by the husband with his own money, yet as he has allowed his wife ostensibly to have control over the property and to mortgage it, she must be considered in fact to be his agent, if he was really the principal, and he would therefore be bound by her act. So, in either view of this case, we decree the appeal with costs, reverse the finding of the Appellate Court, and decree possession of the property sued for to plaintiff.

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The 30th June 1864.

Present:

The Hon'ble F. B. Kemp and A T. T. Peterson, *Judges.*

Irrigation—Right of water.

Case No. 2903 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 9th July 1863, *reversing a decision of the Moonsiff of Chumparun, dated the* 10*th April* 1863.

Run Bahadoor and others (Plaintiffs). *Appellants,*

versus

Poodhee Roy and others (Defendants) *Respondents.*

Baboos Greesh Chunder Ghose and *Khetternath Bose* for Appellants.

Baboo Kally Kishen Sein for Respondents.

A person has no right to tap another's canal and abstract the water therefrom for his own land, unless he has acquired that right by grant or prescription.

Kemp, J.—This case involves a question of considerable importance to the parties concerned, who are agriculturists of the Province of Behar, where irrigation is extensively practised, and we have, therefore, given it careful consideration.

The cause of action, as laid in the Court of first instance, was that the plaintiff, special appellant, had been disturbed in his use of the water flowing from a natural stream through a canal of his own, by the defendant, special repondent, tapping that canal and abstracting water therefrom for his own lands. Whether the defendant had or had not a right to take the water from the stream into his own canal, is immaterial. The defendant could obtain no right to tap the plaintiff's canal unless he had acquired that right by grant or prescription. The simple issue for trial in this suit was, whether the defendant had acquired any right to cut a canal from that of the plaintiff to his own land, and not, as laid down by the Lower Appellate Court, whether the defendant had a right to excavate an ancient water-course leading from a certain stream which had become silted up by deposits caused by a flood. Had such been the issue, the defendant would have been entitled, on proof of ancient user of the water from the stream, to restore the ancient water-course by removing any obstruction to the extent of his right of user, but not further or otherwise, and subject to this condition that he had not by non-user lost his right. The Court of first instance raised the proper issue and found on the facts. The Appellate Court, however, raises an issue not raised below, and which is irrelevant to the subject matter of the action. The plaintiff did not question the right of the defendant to remove the obstruction, but simply his right to tap the plaintiff's canal. The Court of first instance found as a fact that the defendant had cut a canal from plaintiff's canal. The Appellate Court does not reverse this decision on the fact as to the cutting of the canal, but decides that defendant had an ancient water-course which was blocked up, and that he had a right to open it. We are therefore of opinion that the decree of the Lower Appellate Court must be reversed, and the decree of the Court of first instance, subject to modification, upheld. That portion of the decree of the first Court which permits the defendant to open his canal at any other place in the stream so as to entail no injury on the plaintiff, is too wide. The defendant is only entitled to remove the obstruction caused by the flood, and not to open out a passage from any other part of the stream. If he has to go over the land of another, and even if he goes over his own land, he can only take the water to such an extent and in such a manner as not to injure the plaintiff or others who have acquired rights. The costs of this appeal, as well as the costs in the Courts below, will be borne by the special respondent.

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The 30th June 1864.

Present:

The Hon'ble H. V. Bayley and Shumboonath Pundit, *Judges.*

Res judicata (What constitutes).

Case No. 3049 of 1863.

Special Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 11th August 1863, *reversing a decision of the Principal Sudder Ameen of that District, dated the 6th July* 1861.

Maharaj Sing (Plaintiff) *Appellant,*

versus

Mussamut Beela Kooer and others (Defendants) *Respondents.*

Baboos Kally Prosunno Dutt and *Dwarkanath Mitter* for Appellant.

Baboo Kally Mohun Doss for Respondents.

In order successfully to plead *res judicata* under Section 2 Act VIII of 1859, it is necessary that three things should concur, *viz.* that the parties should be the same or their representatives, that the subject matter of the suit should be the same, and the cause of action the same.

Bayley, J.—The ground of special appeal urged before us at the hearing of this case is, that the Judge in his decision of the case of Maharaj Sing, plaintiff, special appellant in No 3049, has wrongly held that that suit and the two suits in which Kunyaloll and Ramlall were respectively plaintiffs are one and identical; and that the Judge has, in consequence, misapplied Section 2 Act VIII of 1859, the Judge's error being that he has held this plaintiff, special appellant, bound by the decisions in the other cases, to which decisions this plaintiff, special appellant, was in no way a party, and by which therefore he could not be bound.

The position of the parties and the leading facts have, for the purposes of this special appeal, been stated to be these:—Suntperka and Deendyal were two brothers by different mothers. Maharaj Sing was the son of the daughter of Deendyal. Beela Kooer was the widow of Deendyal. That widow, it was stated amongst other things, alienated the property in suit by a deed of ikrar in favor of Kunyaloll. Suntperkas, it appears, lived separately from Deendyal, and the latter was in sole possession of the property from 1196 to 1254. Deendyal dying, his widow got possession and had her name registered as proprietress, after which it is alleged she made the deed referred to in favor of Kunyaloll.

In appears that Pulwunt Chund and Kunyaloll claimed and sued for this same property, alleging their respective rights of inheritance; and the other parties who were sued relied on their rights under deeds of sale for the same property; but their alleged vendor, Beela Kooer, denied the alleged sales.

Kunyaloll's claim was decreed, and then on Kunyaloll's admission of his brother Pulwunt's right to a moiety, the claim of the latter to that extent was also decreed, and it was held that no legal power existed in Beela Kooer to sell or otherwise alienate. Now, in this suit of Maharaj Sing, the Judge records that "doubtless these plaintiffs were *not* joined, as I think they should have been, as defendants in this suit, together with Beela Kooer." He also states that the issues which arose were the same, *viz.*, whether Kunyaloll or Beela Kooer, according to Mithila Law, were entitled to succeed; that the contention in those suits was the same; and that, as Beela Kooer defended her case on her own right fully in those cases, plaintiff, Maharaj Sing, is barred in this suit under Section 2 Act VIII of 1859.

It is against this ruling that Maharaj Sing appeals, and we think the plea he has urged is valid.

It has been repeatedly held that in order to plead successfully that a plaintiff is barred under the law just cited, it is necessary that three things should concur, *viz.*, that the parties should be the same or their representatives; that the subject matter of the suit should be the same; and the cause of action the same. Now, here, the Judge admits that the parties are *not* the same. One of the reasons of the rule of law is plain. One party may not have evidence in his particular possession and fail in a claim. Another may have that evidence and succeed. Should the rule applied by the Lower Court here hold good, *viz.*, that because the issues and contention are the same, the plaintiff is legally barred, though *not* a party, the result would be that one party having evidence of title might fail because another *not* having that evidence had failed before him, the former being really not present in the latter's case at all.

Considering the legal objection valid, we reverse the order of the Judge, decree this appeal of Maharaj Singh, and remand the suit for re-trial on all the merits.

This case to be taken up at once out of its turn on the Zillah file.

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The 1st July 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Claims to attached property—Time for bringing suit under Section 246 Act VIII of 1859.

Case No. 1838 of 1863.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 13th April 1863, *reversing a decision of the Moonsiff of Nicklee, dated the 7th August* 1862.

Petumber Shaha (one of the Defendants) *Appellant,*

versus

Kuroona Moyee Debea (Plaintiff) *Respondent.*

Baboo Anund Chunder Ghose for Appellant.
No one for Respondent.

The day on which judgment is pronounced is not to be reckoned within the time allowed for bringing a suit under Section 246 Act VIII of 1859.

Seton-Karr, J.—THIS is a mere question of the mode of computing the time allowed for bringing a suit. After hearing the pleader for the appellant, we are of opinion that the mode adopted by the Judge is quite correct. The Section quoted, 246 of the Civil Code, says "from the date of the order" and nothing more. But Section 333, which refers to appeals, rules that the day on which judgment was pronounced shall not be reckoned within the time allowed for appeal. The same determination was come to by the late Sudder Court on the 1st of March 1864. *See* Circular Order.

Holding, then, that these rulings, though of course not directly applicable to the Section under which the present action is brought, may be safely taken as the correct guide for similar calculations with regard to periods of time for bringing suits, we confirm the judgment of the Appellate Court and dismiss this appeal.

The 1st July 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Trial—Unstamped document.

Case No. 1983 of 1863.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 16th April 1863, *affirming a decision of the Moonsiff of Howlah, dated the 31st July* 1862.

Bissumbhur Doss (Plaintiff) *Appellant,*

versus

Boistub Churn Doss and others (Defendants) *Respondents.*

Baboo Opender Chunder Bose for Appellant.
No one for Respondents.

Where a plaintiff declines to pay the stamp duty and penalty on an unstamped document, the Court, instead of dismissing the suit, should enquire into the merits on the rest of the evidence produced in the case.

Jackson, J.—THIS suit has been dismissed on appeal because the plaintiff did not pay into Court the penalty due on a document which ought to have borne a stamp but did not.

It is said, on special appeal, that the Lower Court held that the stamp prescribed in Act XXXVI of 1860 ought to be paid with penalty; whereas the Stamp Law applicable was the old law of 1829. Act XXXVI of 1860 applies only to deeds executed after it was passed. It does not apply to the document at issue in this suit, and the Lower Court was wrong to apply that law. The case must be remanded to the Lower Court to apply the right law.

We would add, also, that the Lower Court should not dismiss the suit, even if the plaintiff declines to pay the stamp duty and penalty, but should enquire into the merits on the rest of the evidence produced in the case.

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The 1st July 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Limitation (Clause 2 Section 1 Act XIV of 1859)—Damages for Misappropriation of property.

Case No. 3499 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Rungpore, dated the 19th September 1863, affirming a decision passed by the Sudder Ameen of that District, dated the 27th March 1863.

Ram Mohinee Debia and others (Plaintiffs) *Appellants,*

versus

Dole Chunder Dey Sircar (Defendant) *Respondent.*

Baboo Baneenath Bose for Appellant.

Baboo Romanath Bose for Respondent.

Clause 2 Section 1 Act XIV of 1859 does not apply to a suit brought to recover damages for the total and illegal appropriation of property.

Levinge, J.—THIS was a suit brought to recover damages sustained by the plaintiff in the wrongful sale of his property by the defendant. The plea of limitation was not raised by the defendant in his answer, or urged in the first Court; but on appeal to the Judge, the defendant alleged that the suit was barred under the provisions of Section 1, Clause 2, Act XIV of 1859, the suit being for injury to the plaintiff's property; and inasmuch as the plaint on its face showed that the cause of complaint arose more than one year before the bringing of the action, the Court under the 32nd Section of Act VIII of 1859, was bound to reject the plaint.

The same point, and it is the only one, is taken in this special appeal. We hold that this is not an action for injury to personal property; but a suit brought to recover damages for the total and illegal appropriation of the property, and, therefore, does not fall within the provisions of the Clause of Act XIV 1859 above mentioned, and, therefore, the objection must be overruled. This point has been decided by a Full Bench of this Court, dated 26th August 1863, on a reference from the Small Cause Court of Meherpore, by holding that Clause 2, Section 1, did not apply to a case where crops were actually appropriated. We dismiss this special appeal with costs.

The 4th July 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Sale in execution—Suit for possession by shareholders—Limitation.

Cases Nos. 3489 and 3490 of 1863.

Special Appeals from decisions passed by the Judge of Moorshedabad, dated the 27th August of 1863, reversing decisions of the Principal Sudder Ameen of that District, dated the 13th June 1863.

Bebee Athuroonissa and others (Plaintiffs) *Appellants,*

versus

Rughoonath Banerjee, Mr. Ross, and others (Defendants) *Respondents.*

Mr. J. Baptist for Appellants.

Mr. R. T Allan for Mr. Ross, Respondent in No. 3490.

It is not because the purchaser at a sale in execution of the rights and interests of *A* does a wrong and usurps the shares of *A*'s partners that the latter are bound to sue to reverse the sale; but they may sue to recover their shares which, under color of purchase of *A*'s rights and interests, the defendants took wrongful possession of. Nor are they bound to sue to establish their right as past owners of the land within the time allowed by law for institution of actions to set aside sales made in execution.

Steer, J.—THE rights and interests of Nujjub Ali in the property the subject of this suit, were sold in execution of a decree against him in 1851 and purchased by the defendant who took possession of the entire property.

The plaintiffs, the sisters of Nujjub Ali, applied to the Court to restore to them their share; but the Court refused to pass any order, observing that the plaintiffs' rights could not be injured, inasmuch as the sale was merely the sale of whatever rights Nujjub Ali individually possessed.

They then brought a regular suit with the same object and praying that the sale might be set aside. This case was non-suited.

Again the plaintiffs come into Court in the suit now before us to establish their right and title to a specific share of the land as part owners in right of inheritance with Nujjub Ali.

The first Court decreed the suit in favor of the plaintiffs.

The second Court dismissed the suit holding that the plaintiffs should have sued to set aside the sale; that if they had done so, their suit would have been dismissed

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by lapse of time. The Judge further thinks that the omission to sue to set aside the sale is a mere device to defeat the Statute of Limitations; and regarding the suit therefore, as one having for its object the setting aside the sale, he declares the action barred on the ground of limitation.

We think the Judge is wrong in the view he has taken. The plaintiffs do not sue to set aside the sale; but they sue to recover their shares which, under color of purchase of the rights and interests of Nujjub Ali, the defendant took wrongful possession of. The plaintiffs are under no obligation to sue to set aside the sale. Nay, they acquiesce in it, and are willing that the defendant keeps whatever belongs to Nujjub; but he keeps all, when, according to the plaintiffs' allegation, he should only keep a part. They are willing that the sale, so far as the rights and interests of Nujjub are involved, should stand; but they are not willing that their shares, which never were sold, should be taken from them. It is not because the purchaser at the sale of the rights and interests of Nujjub Ali does a wrong and usurps the shares of Nujjub Ali's partners, that the latter are bound to sue to reverse the sale; nor are they tied down to sue to establish their right as part owners of the land within the time allowed by law for institution of actions to set aside sales made in execution. The sale was made the pretext to dispossess the plaintiffs; but that mode of dispossession has not the effect of curtailing the period allowed by law for the institution of actions generally for recovery of land wrongfully taken possession of.

We hold, therefore, that this suit, which is for possession of land, has been brought within time, and we accordingly reverse the decision of the Judge, and remand the case for a decision on the merits.

The 4th July 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Evidence—Map.

Case No. 3520 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 19th of September 1863, affirming a decision of the Moonsiff of that District, dated the 5th June 1860.

Mahomed Ali Ahmed Khan (Plaintiff) *Appellant,*

versus

Imdad-Oor-Rohoman Chowdhry and others, (Defendants) *Respondents*

Baboo Brojendro Kishore Sain for Appellant.

Baboo Grish Chunder Ghose for Respondents.

Where one Court has acted on a map in a suit as genuine and correct, another Court is not bound to receive and act on the same map.

Levinge, J.—The sole point made in this case is that, as a Court had formerly acted on a map in a suit as genuine and correct, the Lower Appellate Court was bound to receive and act on the same map, and had no discretion to reject it or refuse to follow it as correct.

We cannot agree to tie the hands of a Court upon such a broad doctrine as is involved in the above general proposition applicable to the reception in evidence of maps, and therefore we dismiss this appeal with costs.

The 4th July 1864.

Present:

The Hon'ble J. P. Norman, *Offg. Chief Justice,* and the Hon'ble F. B. Kemp, *Judge.*

Limitation—Partition.

Case No. 1878 of 1863.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 14th April 1863, reversing a decision of the Principal Sudder Ameen of that District, dated the 8th December 1862.

Kally Chunder Chowdhry (Plaintiff) *Appellant,*

versus

Rajah Jogender Narain Roy, after his demise, the Collector of Mymensingh, (Defendant,) *Respondent.*

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Baboos Onokool Chunder Mookerjee and *Oprokash Chunder Mookerjea* for Appellant.

Baboos Kishen Kishore Ghose, Mohendro Lall Shome, and Sreenath Dass for Respondents.

The cause of action against a co-sharer for partition first arose when he got possession of the whole property under a survey award.

Norman, C. J.—This is a suit for partition and possession of 4 annas of certain lands, part of Pergunnah Janishahye, by the plaintiff, who alleges himself to be a four anna shareholder, against the defendants, whom he alleges to be the owners of the remaining twelve annas.

The defendants pleaded limitation, and the facts appeared to be, that the lands in question formed part of the plaintiff's and defendants' ijmalee estate Pergunnah Janishahye; that in 1250 a butwarra took place, when these lands were excepted from partition as disputed, they being at that time in the possession of a stranger. A survey took place in 1259, when the defendants, claiming these lands as part of Pergunnah Janishahye, recovered possession of the whole 16 annas.

The lower court dismissed the suit on the plea of limitation.

We are of opinion that the plaintiff's cause of action against the defendant, *his co-sharer, for partition* first arose when he got possession of the land in 1259, A. D. 1852, under the survey award, and therefore that the suit is not barred by limitation. The decision of the lower court must be reversed.

The case of Bheekun Lall *versus* Bukhoree Singh, S. D. A. Reports, 27th November 1858, p. 1720, referred to by the Judge is distinguishable from that now before us. In that case plaintiff's claim to the settlement of a chur had been rejected by the settlement officer in February 1843. He should have sued to reverse that decision within three years but omitted to do so. Bukhoree Singh, the defendant, who was also a claimant, did institute a suit, and in the result obtained a decree for the whole property, but apparently not as part of any ijmalee estate in which Bheekun Lall was a sharer; nor does it appear that he even admitted Bheekun Lall to be interested, as he alleged. He apparently came in by title wholly adverse to that of the plaintiff. Closely examined, that case is simply one where the plaintiff had been out of possession from 1843 till 1855 or 1856. This case must be remanded for trial on the merits.

The 5th July, 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Service Tenures—Quit-rent.

Case No. 3534 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Manbhoom, dated the 12th September 1863, affirming a decision of the Moonsiff of that District, dated 20th June 1863.

Maharajah Nilmoney Sing Deo (Plaintiff) *Appellant,*

versus

Sheo Tewary and others (Defendants) *Respondents.*

Mr. R. T. Allan for Appellant.

Baboo Onoocool Chunder Mookerjee for Respondents.

As an ordinary rule, if land is given on a quit-rent or no rent at all in considerat on of service to be performed, the tenure would lapse when those services ceased.

Quære.—Where no service has been required or performed for a long series of years, and the tenure has been allowed to be held at a quit-rent or no rent at all, whether there has not been such a waivor of service as puts it out of the power of the grantor to resume the tenure simply on the ground that he has now no need of the service for which the tenure was originally created.

Quære.—Also, when land is given at a quit-rent on condition that the grantee shall aid the grantor in repelling the attacks of his enemies, or any other particular purpose, whether, while the grantee is willing to render those services, the grantor can put an end to the contract by saying that he has no enemies to repel, and therefore no need of the grantee's further services.

Steer, J.—The plaintiff sues to resume a jageer on the allegation that the defendants hold it as a service tenure; that they have ceased to perform the stipulated service, and have no right therefore to hold the tenure.

The defendants answered that they and their ancestors have held the land as a jageer from a date long anterior to the accession of the British rule; that they paid the rent stipulated for to the Mogul Government, and have ever since paid only that amount of rent; and that the rent has never varied.

This somewhat difficult case the Courts below have contrived to dispose of without any trial. It appears that the plaintiff was required to produce his proofs on the same day that the issues were laid down. He contended that the burden of proof did not lie upon him, and did not file any proofs. The Moonsiff, therefore, proceeding on the evidence adduced by the defendant, which shewed that he had been sued for rent by the

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plaintiff and that the rent was held to be what it is stated to be in this case, dismissed the plaintiff's case under Section 145 Act VIII of 1859, and this proceeding was considered to be right and proper, and therefore upheld by the Lower Appellate Court.

The words of the Section above referred to are "when the parties are at issue on some "question of law or fact, and issues have "been framed by the Court as hereinbefore "provided, if the Court shall be satisfied "that no further argument or evidence than "such as the parties or their pleaders can at "once supply is required upon any such of "the issues of law or fact as may be suffi-"cient for the decision of the suit, the Court, "after hearing such argument and evidence, "may proceed to determine such issue or "issues," &c. &c.

We think that the important points of facts and the law involved in this case render it one which cannot be properly disposed of under the provisions of Section 145 Act VIII of 1859.

The Lower Courts may be right in thinking that the decree in the rent case is evidence that the defendants and their ancestors have held the jageer from 1206 at a certain amount of rent which has not varied, and they may be right in thinking that this decree is evidence of that fact until it is rebutted. But let it be that the defendants have paid no more and no less than 160 rupees yearly rent for the jageer from 1206, is that an answer to the plaintiff's suit? Certainly not. It may be that possession has been held since 1206, and rent has been ever since paid at the uniform rate of 160 rupees; but if the tenure is a service tenure, and those services have now ceased to be required or to be rendered, the fact of possession, however long, on a fixed rent would not necessarily entitle the defendants to hold the tenure.

As an ordinary rule, if land is given on a quit rent or no rent at all in consideration of service to be performed, the tenure would lapse when those services ceased.

But where no service has been required or performed for a long series of years, and still the tenure has been allowed to be held at a quit rent or no rent at all, it may and no doubt is an important question whether there has not been such a waivor of service as puts it out of the power of the grantor to resume the tenure simply on the ground that he has now no need of the service for which the tenure was originally created.

A question too may arise, when land is given at a quit rent on condition that the grantee shall aid the grantor in repelling the attacks of his enemies, or any other particular purpose, whether, while the grantee is willing to render these services, the grantor can put an end to the contract by saying he has no enemies to repel, and therefore no need of the grantee's further sevices.

All these and other nice questions may arise out of this case. Precedents may be found bearing on the questions; evidence may be forthcoming; custom may be invoked; and arguments will certainly not fail to be employed, and time should be given to the parties to prepare themselves with the evidence and the arguments on which to support their respective cases. For this purpose the suit is remanded, and the Courts will be careful to lay down all the issues which arise on all the points of the case, so that there may be no further miscarriage of justice.

The 5th July 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Mortgage—Lien.

Case No. 3546 of 1863.

Special Appeal from a decision passed by Baboo Gobind Chunder Chowdhry, Principal Sudder Ameen of Beerbhoom, dated the 18th September 1863, affirming a decision passed by Baboo Kedaressur Roy, Moonsiff of Gopalpore, dated the 21st February 1863.

Ram Dyal Banerjee (Plaintiff) *Appellant,*

versus

Ramkulpo Mookerjee (Defendant) *Respondent.*

Baboo Bamachurn Banerjee for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

Where a person, on a former occasion, obtained a decree upon a deed which hypothecated certain property for a debt,—HELD that he could not now sue to enforce that debt as a mortgage against the very same property.

Levinge, J.—THE plaintiff sued to recover the land in dispute from the defendant, on the ground that it was subject to a prior mortgage granted by the defendant's vendors.

The defendant alleged that he purchased the land on 11th Falgoon 1255, and in effect asserts that the land was never mortgaged. This sale was subsequent to the date of the plaintiff's alleged mortgage. But it was proved on the trial of the cause that the plaintiff had obtained a decree against the defendant's vendors on foot of the alleged

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mortgage (in which alleged mortgage were hypothecated all the properties of the defendant's vendor) for the very debt he now seeks to enforce *as a mortgage* against the defendant's land. We consider that this was not a mortgage in the true sense of the word, or carrying with it the rights of a mortgage; and that it was so treated by the plaintiff is clear from the fact of his not suing to recover the property alleged to be mortgaged, but treated his security as a mere bond in which his debtor had undertaken to give a general lien over his property. Such is our view of the nature of the instrument; and we hold that the plaintiff cannot interfere with the possession of the defendant, obtained by purchase for valuable consideration. Appeal dismissed with costs.

The 7th July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Contract—Putnee.

Case No. 1740 of 1863.

Special Appeal from a decision passed by Baboo Sreenath Biddiabagish, Principal Sudder Ameen of East Burdwan, dated the 18th March 1863, reversing a decision passed by Mr. S. Wright, Sudder Ameen of that District, dated the 22nd August 1862.

Rughoonauth Koondoo (Defendant) *Appellant,*

versus

Hurish Chunder Roy and another (Plaintiffs) *Respondents.*

Baboos Mohendro Lal Shome and *Banee Madhub Banerjee* for Appellant.

Baboos Mohesh Chunder Chowdry and *Chunder Madhub Ghose* for Respondents.

If a party binds himself by distinct terms in a contract, he must abide by them, As, if he leases an estate in putnee reserving to himself the right of re-entry on condition of his wishing to hold the property *khas*, he cannot sue to recover possession for the purpose of leasing it to a third party.

Loch, J.—PLAINTIFF gave an 8 annas share of his property in putnee to the defendant, taking a bonus of Rs. 500, and it was agreed that if plaintiff wished at any time to hold the property "khas," the defendant should restore the property on receiving that sum back from the plaintiff.

Plaintiff comes into Court in order to enforce this contract, asking the Court to oblige the defendant to take back the money and to restore possession because he has leased the property to a third party.

Defendant objects to give up the property, as the contract distinctly stated that he should only be obliged to do so if plaintiff wished to hold the estate khas, that is, to take the management of it himself.

The Principal Sudder Ameen, reversing the order of the Moonsiff, has given the plaintiff a decree, and directed the defendant to restore the property on receiving back the bonus; but we think that this decision is incorrect. The plaintiff has bound himself not to demand the restoration of the property except on one ground, which is, that he has determined to take it into his own management; and he cannot come and ask the assistance of the Court to recover possession, prefacing his application by a distinct statement that he, on his part, had violated his part of the contract. It is said that the defendant could suffer no injury, and the objection is merely technical. We are unable to say whether defendant would or would not suffer any injury; but this we hold that, if a party binds himself by distinct terms in a contract he must abide by them.

We reverse the decision of the Principal Sudder Ameen with costs, without prejudice to any claim plaintiff may have under the terms of his lease.

The 7th July 1864.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Mortgage.

Case No. 2172 of 1863.

Special Appeal from a decision passed by the Judge of Sarun, dated the 29th April 1863, reversing a decision of the Principal Sudder Ameen of that District, dated the 12th February 1862.

Mussamut Bebee Rahoman (Plaintiff) *Appellant,*

versus

Mussamut Fuzuloonissa and others (Defendants) *Respondents.*

Mr. G. Gregory and *Baboo Kissen Succa Mookerjee* for Appellant.

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Mr. R. E Twidale for Respondents.

Where a suit for redemption was brought, not on the allegation that the plaintiff succeeded as heir to her husband the mortgagor, but on the ground that she held in right of dower, and the plaintiff in the Lower Courts never based her claim by right of heirship, she was not allowed in special appeal to urge her claim to redeem on the ground of heirship.

Glover, J.—THIS is a suit to recover possession of certain lands in Mouzahs Lakeepore, Mukdoompoor, and Petowree, by cancelling deeds of mortgage executed by plaintiff's (special appellant's) husband. The Court of first instance adjudged the claim as regards one of these Mouzahs, *viz.* Petowree, to be barred by limitation, but gave a decree for the two others, the time for redemption having been extended by the mortgagee.

The Judge held, on appeal, that, as the plaintiff had not produced nor proved the Bye-mokasa which was the ground of her claim, the suit ought to be dismissed.

It is urged in special appeal, *first*, that the Bye-mokasa was not the foundation of the plaintiff's claim; *second*, that if it were so, there were many collateral proofs of it on the record, and its production was not absolutely necessary; and *third*, that even as heir, special appellant has the right to redeem the mortgages in question.

With regard to the first objection there can be no doubt that the suit was brought on the basis of the Bye-mokasa, for when the Principal Sudder Ameen, thinking the points to be somewhat dubious, called upon the special appellant's vakeel for information, that person verified the statement that the suit was brought on the Bye-mokasa. This is, we consider, amply sufficient to fix the ground of the suit.

The second objection is not supported. Special appellant has filed a number of documents, but the utmost they prove is that she is her husband's representative. There is nowhere in them any mention of the Bye-mokasa.

With regard to the third, we observe that the two rights are very different. As heiress of her husband, special appellant would doubtless have, by Mahomedan law, a certain share of his property, but certainly not the share she now claims. Moreover, she has never in the entire course of the proceedings based her claim on rights of heirship; she has sued for power to redeem the mortgages on three different mouzahs not on the allegation that she succeeded to her husband's, the mortgagor's, rights, but on the ground that she held in right of dower and a Bye-mokasa; nothing can be more distinct than the two rights claimed.

We agree with the Judge that the suit was clearly on the basis of the Bye-mokasa, and see no reason to interfere with his decision throwing out that suit on the ground that the aforesaid deed was not produced or proved.

The appeal is dismissed with costs.

The 7th July 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Jurisdiction — Suit for half price of trees cut down by tenant.

Case No. 2656 of 1863.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 19*th of June* 1863, *affirming a decision of the Moonsiff of Arrah, dated the* 29*th November* 1862.

Tohul Roy and others (Defendants) *Appellants*,

versus

Moonshee Mahadeo Dutt, after his demise Moonshee Sheobux Dutt (Plaintiff) *Respondent*.

Moulvie Aftabooddeen Mahomed for Appellants.

Baboo Kishen Succa Mookerjee for Respondent.

A suit for half the price of trees cut down by the tenant and claimed by the landlord by right of usage, is not cognizable under Clause 4 Section 23 Act X of 1859, but in the Civil Court.

Kemp, J.—THIS is a suit for half the price of the trees cut down by the tenant and claimed by the landlord by right of usage. Such a suit is not cognizable under Clause 4 Section 23 of Act X, but in the Civil Court. The Judge's decision is therefore correct.

Appeal dismissed with costs and interest.

The 8th July 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges*.

Mahomedan religious endowment—Succession to office of superior or manager—Joinder of actions—Suit for possession and mesne profits—Stamp Duty.

Case No. 51 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 4*th December* 1863.

Bebee Syedun, mother and guardian of Shah Mahomed Wasin (Plaintiff) *Appellant*,

versus

Syud Allah Ahmed and others (Defendants) *Respondents*.

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The Advocate-General and *Baboos Unookool Chunder Mookerjee* and *Taruck Nath Sein* for Appellant.

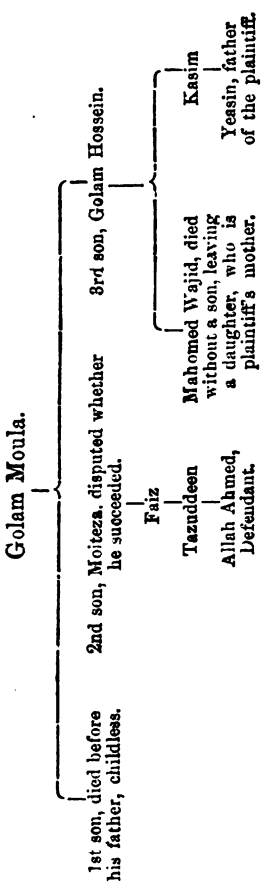
Mr. R. V. Doyne, Moonshee Ameer Ali, and *Moulvie Aftabooddeen Mahomed* for Respondents.

In a Mahomedan religious endowment where it is essential that the superior or manager should have certain qualifications which succession by descent would not always ensure, the theory of hereditary succession is most unlikely and out of place.

A claim for possession and a claim for mesne profits may be brought separately, or they may be united. When united, a separate stamp fee for mesne profits is not necessary.

Steer, J.—This is a suit to obtain possession of the office of superior to a religious endowment, together with the lands and other property thereto belonging, and also to recover other properties, the exclusive right of the plaintiff's father.

It is not stated by whom the endowment was made, but both parties agree that Golam Moula was formerly the superior; both start their claim from him, and he is the common ancestor of both. The pedigree is as follows:—



It is admitted that, whether Moiteza succeeded or not, the 3rd son of Golam Moula, that is to say, Golam Hossein, did certainly succeed to the office of superior. He was succeeded by Kasim, and Kasim was succeeded by Yeasin, who held the office until his death. At that time the plaintiff was not born, and Allah Ahmed, defendant, applied to the collector for the office, and he obtained it.

The contention of the plaintiff is that the office goes by descent; the eldest son, where there is a son, succeeds the father.

The contention of the defendant is, that the office goes by election among the co-sharers of the property. They elect a successor, fit and qualified, from among the larger sharers.

There is really no evidence that, as a rule of custom, the office goes by descent. A few witnesses say generally that the invariable rule in the institution is, that the son of the superior succeeds to the father in the office. But they are men of no weight. Nor is it clear that the succession has devolved upon the son in the several changes which have occurred in the office since the time of Golam Moula. This man had a son Moiteza, who had a son Faiz. Whether Moiteza was a lunatic, as plaintiff avers, or not, there is no evidence either way. Whether he held the office of successor or not has not been cleared up by any evidence; but it is certain that Faiz, his son, did not succeed, but Golam Hossein, the brother of Moiteza, became the superior. If Moiteza was not a lunatic he ought to have succeeded; if he did succeed, Faiz, his son, should have succeeded; but it is uncertain whether Moiteza was an idiot or not, or whether he became superior. Therefore any evidence drawn from the mode in which the succession to the office has actually taken place is wanting. We do not know that Moiteza was not the superior; if he was the superior, the theory of the plaintiff that the son succeeds the father is destroyed by the fact, which is not disputed, that Faiz, the son of Moiteza, did not succeed to the office.

But the fact is that, besides the absence of actual or presumptive proof of succession by inheritance, the plaintiff has not gone far enough back to establish a custom. Between him and Golam Moula there have been only three generations; and it is matter of doubt whether, in those three, the eldest son, where there was a son, succeeded to the office; and it may be that in those few cases the eldest son was the fittest member, and that the election fell on him; and as a fact, it is beyond all dispute that Golam Hossein was not the eldest son, nor was Kassim, when they respectively obtained the office.

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Further, it appears that the action alleged has not been acquiesced in, for Faiz disputed the succession of Mahomed Kassim, and we find the defendant, who is not the son of the last superior, is in the office now.

The very nature of the office and the duties of it are opposed to the theory that it devolves as of right to the eldest son of the last superior. As a general rule of inheritance this would not be the case in a Mahomedan family, and in a religious endowment, where it is essential that the superior or manager should have certain qualifications which succession by descent would not always ensure, the theory of hereditary succession is most unlikely and out of place.

On the whole, then, we think that, while the actual evidence of a custom by descent is weak in the extreme, the presumptions are altogether in favor of the truth of the defendant's statement that the office depends on the choice of the co-sharers, and that the succession to the office of superior is not dependent on the rules of the ordinary Law of Succession, and therefore we confirm the order of the Lower Court which dismissed this part of the plaintiff's case.

In respect to the property, personal and landed, which are said to have been acquired by the plaintiff's father in his own independent right, we find no satisfactory evidence. Witnesses have been adduced to prove this part of the claim, but their evidence is too general and too inconsistent one with another to entitle it to be received as evidence of the claim; and of documentary evidence there is none at all. It is true that the defendant does not claim some of the properties; but even to these we think the plaintiff has not established his right to a decree, inasmuch as it has not been shewn that the defendant is in possession of them, or that it is by any act of his that the plaintiff is kept out of them. We therefore dismiss also this part of the claim, without prejudice to any suit which the plaintiff may hereafter bring against the parties who may be in wrongful possession of the property claimed by the present defendants.

The Principal Sudder Ameen held the claim for this exclusive property to be barred by the Law of Limitation, and the learned Counsel for the appellant, the Advocate-General, relied much on this fact as necessitating a remand; but the issues laid down called for evidence on this point, and the evidence on the record has enabled us to dispose of it on the merits, though the decision of the Principal Sudder Ameen was clearly wrong as contended for by the learned Counsel.

We have disposed, then, of the questions as far as they affect the respondents, and we declare the appeal dismissed with costs.

An objection has been taken to the order of the Principal Sudder Ameen requiring from the plaintiff a stamp fee of 1,000 Rs. The plaintiff sued for possession and wasilat, engrossing the plaint on a 2,000 Rs. stamp paper. The Principal Sudder Ameen directed the two claims to be separated, and called on the plaintiff to pay on account of the claim for wasilat a stamp fee of 1,000 Rs. This we hold was altogether unwarranted. A claim for possession and a claim for wasilat may be brought separately; but it is quite an error to suppose that they cannot also be united. They were united, and they ought to have been tried as one suit. We think, therefore, that the plaintiff is entitled to have refunded to him the extra stamp fee of 1,000 Rs., which he has had to pay, and he may proceed to recover it according to the usual course in such cases.

The 8th July 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Land taken by Government for public purposes—Interest.

Case No. 107 of 1864.

Regular Appeal from a decision passed by Baboo Greesh Chunder Ghose, Principal Sudder Ameen of the 24-Pergunnahs, dated the 15th January 1864.

Syud Keramut Ali Mutwalee (Defendant) *Appellant,*

versus

Raja Suttochurn Ghosal (Plaintiff) and others (Defendants) *Respondents.*

Suit laid at Rs. 5,042-14-6.

Mr. R. E. Twidale and *Moonshee Ameer Ali* for Appellant.

Baboos Kissen Kishore Ghose, Hem Chunder Banerjee, and *Chhoy Churn Bose* for Respondents.

Where land was taken by Government for public purposes and, in consequence of the claim of the defendant, the amount of compensation was invested by the Collector under Section 29 Act VI of 1857 in Government Securities, the plaintiff was declared not entitled, over and above the principal of the sum of compensation and its accruing interest in the hands of the Collector, to demand interest from the defendant at the rate of

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12 per cent, per annum upon the principal sum from the date it might have been payable to him but for the counter-claim of the defendant.

Steer, J.—This is a suit arising out of claims to compensation for land taken by Government for public purposes.

The sum of the compensation has been invested by the Collector, under the provisions of Section 29 Act VI of 1857, in Government Securities, and the only question now between the parties is, whether the plaintiff is entitled, over and above the principal of the sum of compensation and its accruing interest in the hands of the Collector, to demand interest from the defendant at the rate of 12 per cent. per annum upon the principal sum from the date it might have been payable to him but for the counter claim of the defendant.

It appears that when the land was taken, claimants were invited. The plaintiff appeared and claimed the land as his lakheraj. The defendant claimed it as belonging to the rent-paying lands of the Syudpore trust estate, of which he was the Mutwalee.

It was owing to these counter claims that the Collector thought it proper to hold the money in deposit.

After the Mutwalee defendant had preferred his claim, he instituted a regular suit to resume the land, on the ground that the plaintiff held it on no valid title. This suit was dismissed on the 28th April 1863.

The plaintiff then again applied to the Collector to pay him the money; but the defendant Mutwalee's claim not having been withdrawn, the Collector did not feel himself safe in granting the application.

The plaintiff then issued a notice on the defendant Mutwalee, calling on him to withdraw his claim, but he appears to have taken no notice of it.

Having no resource left, the plaintiff instituted this suit on the 2nd August 1863, for a declaration of his title to the amount of the compensation, and to recover from the defendant Mutwalee interest upon that sum during the period that he was kept out of it by the defendant's opposition, at 12 per cent.

As already observed, the money has been invested in Government Paper and yields 5 per cent. interest. The plaintiff's right to this was not disputed in this suit, but he claims, from the date the money might have been available up to the date of institution of this suit, interest at the rate of 12 per cent., and this the defendant resists.

Probably, the plaintiff, if he had received the money when he applied for it, might have made more than 5 per cent. by it; but the question is, What has the defendant done which renders him liable to make up to the plaintiff the difference between 5 per cent. and 12 per cent., which is the ordinary rate of calculating interest, and which possibly the plaintiff might have obtained if the principal had been at his service?

We think that the defendant was quite justified in putting in his claim to the money, if there was any doubt as to the validity of the lakheraj title upon which the plaintiff claimed it. That there was this doubt is evident by the suit which the defendant brought for the very purpose of putting the plaintiff to the proof of his title. While, therefore, the defendant was honestly contesting the question whether the plaintiff, or he, had the title to the money, he cannot be held to have rendered himself liable to the payment of damages in lieu of the interest of the money while it was in dispute. In this view the plaintiff can have no claim on the defendant for any period before the 28th April 1863, when the defendant's suit to resume the land was dismissed and the plaintiff became the absolute owner of the land by a final award. He might certainly have withdrawn his application when the decree in the resumption suit declared the land to belong to the plaintiff, but he did nothing and left matters to take their own course. If by not withdrawing his claim the plaintiff has been injured, in that he has lost the means of making a larger profit out of his money than the 5 per cent. it has yielded, it is a case which might entitle him to damages. But he does not claim what he sues for as damages, but as interest. As interest, he is not entitled to it from the defendant, who has not touched the money; as damages, he does not ask for it, and could not get it without showing loss, which he has not done.

The costs of the suit in the Lower Court have been given against the defendant. A large sum of money, as principal, will be recovered under this decree by the plaintiff. The money has not been lying idle, but has yielded 5 per cent.; and, on the whole, we think the plaintiff has no cause to complain with these results. We accordingly modify the judgment of the Lower Court. The plaintiff is declared entitled to the sum of the compensation with its accumulated interest from the Collector and his costs in the Court below as the Court has decreed it. The costs of this appeal must, however, be charged to the plaintiff, as he has entirely failed in the appeal.

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The 8th July 1864.

Present :

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Right of suit — Possession — Execution.

Cases Nos. 267 and 268 of 1863.

Regular Appeals from decisions passed by Mr. A. E. Russell, Judge of Moorshedabad, dated the 30th January 1863.

Case No. 267.

Ranee Shamasoondery Debea (Defendant) *Appellant,*

versus

Bejoy Gobind Bural and others (Plaintiffs) *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

Baboo Sreenath Doss for Respondents.

Case No. 268.

Mr. R. Watson and others (Defendants) *Appellants,*

versus

Bejoy Gobind Bural and others (Plaintiffs) *Respondents.*

Mr. R. T. Allan and *Baboos Onookool Chunder Mookerjee* and *Mohinee Mohun Roy* for Appellants.

Baboo Sreenath Doss for Respondents.

A party has no right to bring a civil suit to get possession of land which has been taken from him and awarded to his adversary in the execution of a decree in a boundary suit.

Levinge, J.—Both these appeals are from the same judgment, and taken by separate defendants, Watson and Ranee Shamasoondery.

The defendants' and the plaintiff's property are adjacent to each other. It appears that there had been a boundary dispute between the ancestors of plaintiffs and defendants, and a suit was the consequence. In that action the now defendants' ancestors were the plaintiffs, and they instituted it to recover 419 beegahs of land, from which they alleged they had been dispossessed by the now plaintiffs. They got a decree on the 23rd Jeyt 1264 against the present plaintiffs, and allege that they were put in possession of these lands, the subject of this suit, under and in execution of that decree. The case having been heard before the Lower Court, the Judge decreed in favor of the plaintiffs; and the defendants instituted the present appeals. On the argument of those appeals, the High Court, by an order of remand dated the 2nd March 1864, sent the case back to the Judge to try the issue whether the lands in dispute in the suit are the same regarding which the plaintiffs had complained that the defendants had taken possession beyond the decree; and whether the lands in dispute, irrespective of the boundaries of the decree or of the objection of the plaintiff in the execution case, did actually come under the possession of the defendants at the time of the decree being executed as parts of the land covered by the decree.

The Court of Appeal required the information sought by the above issues before it was in a position to determine the liability of the defendants under the decree appealed against. The Judge has, on the remand, found as a fact that the lands in dispute in this case "did actually come into possession of defendants at the time of the decree being executed as part of the lands covered by the decree, as ordered by the warrant of the Principal Sudder Ameen of 11th December 1858, in which the boundaries are distinctly laid down," &c. This being the case, we have no hesitation in reversing the decree of the Lower Court and in dismissing the suit, following the repeated rulings of this Court which disallow a party the right of bringing a Civil suit to get possession of land which has been taken from him and awarded to his adversary in the execution of a decree in a boundary suit. The present plaintiff objected in the Execution Department to this land being made over to the defendants under the decree, but he allowed those proceedings to drop; and we cannot allow him the right of further agitating the question whether the same land, which clearly passed to the defendants in execution of their decree, now belongs to him.

We have been asked by the pleader for the respondent (the plaintiff) to notice the decision of the Sudder Court reported in the decisions of 1858, 26th March, p. 509, and which he has cited to show that the plaintiff is not barred from trying his title to this land under the circumstances proved in this case. But we find that, in that case, it was a sub-

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ject of doubt with the Court whether the land sued for and the land taken in execution were identical, and the Court were, in consequence, unable to pass any decision, and remanded the case for further enquiry, just as has been done in the present case; but we do not understand the Court as laying down an inflexible rule, that even although the lands are proved to be identical, the plaintiff has a right to institute his suit when he chooses to withdraw his objections in the Execution Department.

We allow these two appeals with costs.

The 8th July 1864.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Jurisdiction (of Civil Court)—Minors (Person and Education of)—Authority of Court of Wards.

Case No. 542 of 1863.

Regular Appeal from a decision passed by Mr. O. W. Malet, Judge of Beerbhoom, dated the 8th July 1863.

The Collector of Beerbhoom (Defendant) *Appellant,*

versus

Mundakinee Debia (Plaintiff) *Respondent.*

The Legal Remembrancer and *Baboos Kishen Kishore Ghose* and *Juggadanund Mookerjee* for Appellant.

Mr. R. V. Doyne and *Baboo Banee Madhub Banerjee* for Respondent.

No Civil action will lie against the Court of Wards in respect of anything done by it regarding the person and education of any minor entrusted to its superintendence.

Jackson, J.—The plaintiff brought this suit as next of kin of the minor Ramrunjun Chuckerbutty against the Collector and the Board of Revenue as representing the Court of Wards, to restrain that Court from carrying into effect an order alleged to have been passed without legal authority by the Board of Revenue, directing that the minor shall be sent to Calcutta to be educated at the Wards' Institution. The interposition of the Civil Court is claimed on the ground that the minor's health will be seriously injured by the move to Calcutta, and that the Board of Revenue has no authority under the law (Act XXVI of 1854) to reverse the order of the Commissioner as to the place where the minor shall be educated.

The Judge of Beerbhoom has held that such a suit can be brought in the Civil Courts; that the Board of Revenue has power under the law to revise the order of the Commissioner of Revenue in all matters connected with the Court of Wards; and that there is sufficient evidence to prove that the removal of the minor to Calcutta will be injurious to his health. He has accordingly passed a decree, directing that the order of the Board of Revenue shall not be carried out, and that the minor shall be educated at Beerbhoom.

The Legal Remembrancer, for the Court of Wards, has contended before us that this suit cannot be heard; that the superintendence of the education of all such minors as Ramrunjun Chuckerbutty has been vested by the Legislature in the Court of Wards; that the special enactment, Act XXVI of 1854, has declared that the Court of Wards shall determine the district and school at which such minors are to be educated; and that their orders on such points cannot be revised by the Civil Courts The Legal Remembrancer further contended that, even if the suit could be brought, the evidence produced by the plaintiff did not satisfactorily establish that the minor would be injured in health by being sent for his education to the Wards' Institution in Calcutta

Mr. Doyne for Mundakinee Dabee respondent, has, on the other hand, urged that the Civil Courts have jurisdiction over all suits of a Civil nature, with the exception of suits of which their cognizance is expressly barred by any Regulation or Act; that the Legal Remembrancer had been unable to quote any law barring their jurisdiction in suits against the Court of Wards; that Regulation X of 1793 appointed the Board of Revenue as Court of Wards to be ex-officio trustees of a certain description of minors; that, as such trustees, they are liable to the jurisdiction of the Civil Courts in the same manner as all other trustees, official or non-official, are liable; that the Court of Wards had no judicial powers, and could make no judicial enquiries, but were executive trustees, and, as such, their acts could be interfered with by the judicial tribunals of the country on sufficient cause being shown.

With reference to Act XXVI of 1854, Mr. Doyne argued that, if the authority there

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given to Collectors and Commissioners was judicial, the order of the Collector as to the place where the minor was to the educated was appealable to the Commissioner only, and that the order of the Commissioner on appeal was final; that the Commissioner was in fact the Court of Wards, the power of the Board of Revenue as Court of Wards having been transferred, by Regulation I of 1829, to the Commissioners.

The only precedent quoted on the point of jurisdiction was the case of Nund Coomar Roy *versus* Hurripren and others, 6th September 1838, page 233, Vol. V of the Selected Sudder Dewanny Adawlut Reports. The Legal Remembrancer relied upon this as showing that the Civil Courts could not interfere; while Mr. Doyne contended that the report led to the conclusion that the Civil Courts could have interferred, had the Judges not been of opinion that the Court of Wards had acted legally and exercised a proper discretion.

It does not appear from the report of this case that any question was then raised as to the jurisdiction of the Civil Courts to interfere in the duties entrusted to the Court of Wards. The orders of the Court of Wards were, as in this case, questioned both on the ground of illegality and on the ground that they were injurious to the minor, and the Judges, I think, determined both points.

The Court of Wards was established by Regulation X of 1798 The Board of Revenue was declared to be the Court of Wards. Their duties were defined to consist of the management of the estates and the superintendence of the education of the minors entrusted to their charge. Clause 2 Section 5 of the Regulation barred the ordinary jurisdiction of the Civil Courts in any suit to prevent the Court of Wards from taking under its charge any particular minor on the ground that he did not fall within the provisions of the law, and a special judicial procedure was enacted for the decision of such questions. Section 36 ruled that the different officers of the Court of Wards were liable to actions in the Civil Courts for all acts done in breach of their respective trusts after the expiry of the trust. The Regulation nowhere makes mention of any such suit as that now preferred by the plaintiff in this case. If, then, the suit is one of a Civil nature, there is no bar to the jurisdiction of the Civil Courts in this Regulation.

Act XL of 1858, Section 2, was quoted during the argument as barring jurisdiction. That law gives the Judges authority to appoint managers and guardians in the cases of all minors except those who have been entrusted to the charge of the Court of Wards. But the jurisdiction of the Civil Courts to restrain guardians and trustees from injuring minors entrusted to their charge, either in their person or property, does not originate in Act XL of 1858, but in the general powers of the Civil Courts as laid down in Regulation III of 1793 and Act VIII of 1859.

The position of the Court of Wards is, however, very different from that of ordinary trustees. They are public functionaries appointed by the Legislature to perform certain duties. The established rule in English Law is that Courts of Equity will not interfere with the acts of public functionaries who are exercising special public trusts or functions, so long as those functionaries confine themselves within the exercise of those duties which are confided to them by the law. They will not interfere to see if any order passed by such functionaries is a good or a bad order. But if they act against the law, or assume to themselves powers which the law does not give them, the Courts will interfere. (Story's Equity Jurisprudence, Vol. II., Sec. 955a.)

It appears to me that we shall do well to follow this rule as respects the Court of Wards.

The first question, then, is whether the Board of Revenue have assumed to themselves authority which the law does not give them. It is said that the authority of the Board of Revenue as Court of Wards passed away from them when Regulation I of 1829 was enacted, and was vested in the Commissioners of Revenue.

Section 1 states that it has appeared expedient to confide to the Commissioners of Revenue the powers that belong to the Board of Revenue. Section 4 states that the Commissioners shall possess and exercise within their respective divisions the powers and authority now vested in the Court of Wards subject to the control and direction of a Sudder or Head Board and to such restrictions and provisions as the Governor General in Council or the said Sudder Board may prescribe. Act XXVI of 1854, Section 1, enacted that the general superintendence and control of the education of any minor, whose property has been brought under the management of the Court of Wards, is vested in the Collector of Revenue acting under the said Court of Wards. Section 2 declared that it shall be lawful for any Collector of Revenue to direct that such minor shall attend, for the purposes of education, such school or college as to the Collector may appear expedient. Section 8 ruled that all orders and proceed-

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ings of a Collector under this Act shall be subject to the revision of the Court of Wards, and any person aggrieved by any such orders or proceedings may prefer an appeal therefrom to the Commissioner of Revenue acting as a Court of Wards in and for the division to which such Collector belongs.

The facts of the present case are that both the Collector and the Commissioner were of opinion that the minor should be allowed to remain in Beerbhoom and be educated at the English school in Soory, and ordered accordingly. The Sudder Board of Revenue at first acquiesced in this proposal; but upon a letter from the Government of Bengal, they passed an order that the minor should be sent to Calcutta to be educated at the Wards' Institution. Some objection was raised to the interference of the Government in this question. But the Board appear to have passed the order as their own order. The only question, therefore, before this Court is as to the power of the Board to pass such an order.

It appears to me that Act XXVI of 1854 must be read with Regulation I of 1829; that the Sudder Board of Revenue have authority to control and direct the Commissioners of Revenue on the powers vested in them by Act XXVI of 1854 as in all other points connected with their duties as Court of Wards; that the extent of this control is nowhere defined, and that it may therefore be exercised on the smallest points as well as on general questions; and that, consequently, the Sudder Board of Revenue had authority to pass the order complained of.

The order, then, being one which the Board of Revenue, under its powers under Regulation I of 1829, could legally pass, the Civil Courts will not interfere. The evidence as to the move to Calcutta being injurious to the minor, is merely surmise and opinion. The Doctor of the station deposes that his health may suffer, and his relations depose that the climate of Calcutta is often injurious to inhabitants of the district of Beerbhoom. But it is by no means improbable that the change to Calcutta may be beneficial instead of injurious to the boy. This is a question on which the Court of Wards are, by law, specially authorized to exercise their own discretion. The Civil Court will not interfere to decide whether the Court of Wards has exercised a good or a bad discretion. I would therefore reverse the decree of the Judge of Beerbhoom and dismiss this suit.

Looking to all the facts of the case, I would direct that the costs of this litigation be paid out of the minor's estate.

Glover, J.—My learned colleague, Mr. Justice Jackson, has gone so fully into the circumstances of this case, that I have only to state the conclusions to which a consideration of the evidence has brought me.

Whilst fully admitting the principle enunciated in Act VIII of 1859, that all wrongs should have their remedy, I think that the present action does not disclose any legal wrong as against the defendant, appellant, or those functionaries under whose orders he acted, and that, so far as regards the custody of a minor's person or the appointment of his place of education, the Board of Revenue, acting as the Court of Wards, has by law an authority that cannot be questioned, and that no Civil action for anything done in discharge of this particular part of its duty will lie. It may be, as argued by the respondent's Counsel, that the Court of Wards ought not to be armed with such irresponsible power, but with that we have no concern. We must apply the law as we find it.

There are three Regulations constituting the authority now complained against—Regulation X of 1793, Regulation I of 1829, and Act XXVI of 1854.

Regulation X of 1793, which puts into a legal shape certain rules of the 20th August 1790 and of the 15th July 1791, constitutes the Board of Revenue the Court of Wards and provides specially that the persons and estates of all minors under its charge shall be subject to it.

Section 5 of that Regulation defines the cases in which reference is to be made to the Civil Court, *viz.* cases of disputed minority, lunacy, (this part of the Section has since been amended by Act XXXV of 1858) and other disqualifications for the management of an estate. In these cases, the Civil Court steps in and enquires into the question of disqualification. The local Dewanny Adawlut has only power, it would seem, to record its opinion the actual decision in each case resting with the Sudder Court, and the final orders, passed in concurrence therewith, with the Governor General in Council. *Vide* Clauses 2, 3, 5, and 6.

By Clause 2, Section 31, the Court of Wards, *i. e.*, the Board of Revenue, has power to hear suits against executors for fraud committed during their management of minors' estates, and the local Civil Court is directed to carry out the Board's awards as if they were judgments of its own Court.

I can find no other instances under this Regulation in which the Civil Court has power in any way to take cognizance of the decisions of the Court of Wards.

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Regulation I of 1829 creates the Sudder Board of Revenue and Commissioners of Circuit, and Clause 1 Section 4 of the Act vests these Commissioners of Circuit with the powers of a Board of Revenue and of a Court of Wards, unless otherwise specifically provided by law. They are made, *quoad* their powers as Court of Wards, subject to the control and revision of the Sudder Board of Revenue and of the Governor General in Council, in other words, of the local Government, whatever that may happen to be.

Section 6 repeals all previous Regulations connected with the Court of Wards and Board of Revenue which are inconsistent with the appointment of Commissioners of Circuit.

Now it is manifest that the power of hearing suits brought against the Court of Wards, heretofore possessed by the local Civil Courts, could not be inconsistent with the appointment of Commissioners of Circuit; for the new office did away with the powers of the Judges of the Provincial Courts of Appeal and Circuit only, and did not of course touch the Courts of ordinary civil jurisdiction, still less the Court of Sudder Dewanny Adawlut, which was the real Court of resort in all cases in which the Court of Wards was concerned.

In this respect, therefore, the old law remained unchanged, and, save with regard to disputed minority, disqualification, and, to a certain extent, to fraud, the Civil Courts had no power to interfere with the Court of Wards, which still moreover retained the absolute control of the person of the minor.

This last privilege was afterwards still more clearly given to the Court of Wards by Act XXVI of 1854. The Collector acting as agent of the Court of Wards is there declared to have the power of deciding where a minor shall be educated, and his orders are appealable to the Commissioner acting as a Court of Wards.

This Section was greatly relied upon by the respondents' Counsel before us, Mr. Doyne, to show that, even supposing, for the sake of argument, the Civil Court to have no ordinary jurisdiction over the Court of Wards, the order of the Commissioner acting as a Court of Wards in the matter of the choice of a minor's residence, was a final order, and that, therefore, the interference of the Board of Revenue and of the Government of Bengal was illegal. I do not see the question in this light. Regulation I of 1829 has never been repealed, and Act XXVI of 1854 does not restrict its provisions in this particular. By the former Regulation all orders of the local Courts of Wards, of Commissioners of Circuit that is, were revisable first by the Sudder Board of Revenue, and afterwards by the Governor General in Council—a phrase which confessedly means the local Government. In Act XXVI there is no mention that the Commissioner's order is to be final, and the only reasonable conclusion, therefore, is that, as the old rules regarding revision were not repealed, they must be considered still in force, and that all orders of a Commissioner of Circuit touching the custody and education of a minor, are revisable by the Board of Revenue and the local Government, or, in the present case, by the Lieutenant Governor of Bengal.

We have no assistance from precedents in this matter, the point at issue before us being confessedly now raised for the first time. The Legal Remembrancer, however, on the part of the Court of Wards, quoted two decisions of the late Sudder Dewanny Adawlut, as bearing on the case—Nund Koomar, Rai appellant, *vs.* Ranee Hurri Prya, respondent, and Government, appellant, *vs.* same respondent, (Select Reports, Vol. V, page 233); and Raja Annund Nath Roy *vs.* Collector of Rajshahye and others (Sudder Dewanny Adawlut, 17th June 1850). He argued from the decisions given in these cases that the Civil Courts could not interfere with the official acts of a Collector acting under the Court of Wards. Mr. Doyne, on the other side, contended that the precedents rather supported his view of the case, as the Sudder Court did not refuse to interfere on the ground of want of jurisdiction, but simply because they thought the Commissioner's acts in the first case justifiable, and in the last a matter of personal liability only.

The precedent of 1838, above quoted, is not very clearly worded; but, on the whole, I am disposed to concur in the argument that it does not declare the Civil Court not to have jurisdiction, but simply declines interference on the ground that the Court of Wards had acted with discretion. In the other precedent, that of June 1850, the Sudder Court held that, the case was, under Section 36 Regulation X of 1793, one of personal responsibility as regards the Collector, and that no action could lie against his successor in the office in his official capacity. But even if it be admitted that these precedents establish the right of a Civil Court to entertain suits against the Court of Wards for acts done in its official capacity against the property of the minor, it is, in my judgment, impossible to carry them further, and they cannot be strained into giving such Court the power to interfere, where the question at issue does not concern the property, but only the person and the education of a minor, for

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both of which a special provision of law has given the Court of Wards a special and irresponsible power. The question before us is simply this.

I hold, therefore, that the Judge had no jurisdiction in this case, and that no Civil action will lie against the Court of Wards for anything done by it regarding the person and education of any minor entrusted to its superintendence.

As I take this view of the law, there is no necessity for me to go into the question of justification, further than to express my opinion that, under the circumstances, the minor might have been allowed to remain at his own home and be (for the present at least) educated at the English school at Soory. Granting the discrepancies in the medical evidence, the boy is confessedly weakly if not positively in bad health: he is, moreover, the only surviving son of the family, and there are ample means of educating him carefully and satisfactorily at Beerbhoom itself.

I concur, therefore, with Mr. Justice Jackson as to the impropriety of the Judge's order forbidding the minor's transfer to Calcutta, and think that that decision should be reversed. I agree also with my Colleague, that, under the circumstances, the costs of this suit should come out of the minor's estate.

The 8th July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Wills (Interpretation of).

Case No. 2632 of 1863.

Special Appeal from a decision passed by Mr. J. S. Bell, Principal Sudder Ameen, with powers of the Judge of Dacca, dated the 29th June 1863, affirming a decision passed by Mr. T. C. Pennington, Sudder Ameen of that District, dated the 12th September 1862.

Mrs. Mary Pogose (Defendant) *Appellant,*

versus

Mussamut Chamarini Bibee (Plaintiff) *Respondent.*

Messrs. R. T. Allan and *G. Gregory* for Appellant.

Baboos Chunder Madhub Ghose and *Nobo Kisto Mookerjee* for Respondent.

The scope and intent of wills, when disputed, must be decided and interpreted by Courts of Law, and not by admissions made by unadvised persons through third parties.

Seton-Karr, J.—The facts in this case are either admitted, or have been found by the Lower Courts with clearness and precision. The case turns entirely on the construction of a Clause in the Will of the late Mr. Hollow of Dacca.

By the 10th Clause of that document, the testator bequeathes to the plaintiff the sum of 5,000 rupees, that is to say, he gives her the interest of the same for her life-time, and makes a further provision for the appropriation of the interest after her death. The Will then goes on to say:—"I *also* desire that "on a piece of ground in Putwatola, which "belongs to me, a small lower-roomed house "and a pucca cook-room be built for the "residence of Chamarini (the plaintiff), and "to be enjoyed by her as long as she continues "in good repute."

Now, in an action by the plaintiff against the representatives of Mr. Hollow, for the interest on the above sum of 5,000 rupees, which has been detained by them, the Lower Courts have both found, as a fact, that the plaintiff has ceased to be of good repute and has gone astray, but they hold that continence and respectability are not conditions essential to the receipt of the interest on the sum of 5,000 rupees. Such conditions, they appear to hold, would be necessary for the plaintiff's residence in the house which the testator designed to be built for her on his own land. But there is no question of this house, or of residence in it, in the present suit.

After hearing Mr. Allan against the decisions of the Lower Courts, and after carefully perusing the Clause of the Will which they interpret, we are of opinion that the legal interpretation put on the Clause is perfectly correct. The decency of the plaintiff's behaviour and her continence were conditions essential to her residence in a house to be built for her on the testator's private property. And we can readily conceive that a testator might provide for the absence of future scandal and annoyance, if a legatee were to be permitted to reside on land belonging to him or in a house created by his money, while he might be less careful to insist on such a condition in the case of a mere money payment, which could be made to the legatee, in this view, who was a connection of his old housekeeper, wherever she resided, or whatever line of conduct she might adopt.

At any rate, we have only to carry out the wishes and intentions of the testator, and we are quite clear that the Lower Courts have correctly interpreted his meaning.

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It was also urged on us that, in a mooktearnamah, the plaintiff has admitted that the receipt of the interest was contingent on her good behaviour. This does not alter our view of the case. The scope and intent of Wills, when disputed, must be decided and interpreted by Courts of Law and not by admissions which females, not versed in such matters, or badly advised, or wholly ignorant of the precise phraseology employed, may be induced to make through third parties.

Having, therefore, no doubt of the correctness of the decisions, we dismiss the appeal with costs.

The 8th July 1864.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Breach of Contract—Sale—Specific penalty—Damages.

Case No. 3062 of 1863.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of West Burdwan, dated the 27th July 1863, affirming a decision of the Sudder Ameen of that District, dated the 30th of August 1862.

Sheikh Tosodookh Hossein and others (Defendants) *Appellants,*

versus

Sheikh Meajan and others (Plaintiffs) *Respondents.*

Baboo Aushootosh Dhur for Appellants.

Moulvie Murhumut Hossein for Respondents.

Where two co-sharers in a property bound themselves not to sell to a stranger, and one of them in violation of the secret arrangement did so sell, but cancelled the sale before the present suit was brought to recover the penalty,—HELD that, whether the sale had been cancelled or not, the plaintiff could have no claim to a specific penalty, but that his only remedy was an action for damages for any injury which he might have sustained.

Glover, J.—SPECIAL respondent (plaintiff in the Court below) sued to recover possession of an 8 anna share in an ancestral talook, and to set aside a deed of sale and a dur-putnee lease whereby it had been conveyed to other parties.

It appears from the record that the parties to this suit were joint owners of the talook in question, and had entered into a contract together not to alienate their several shares to any stranger.

On the 19th Jeyt 1268, however, five years after entering into this agreement, the special appellants alienated their share to third parties by a dur-putnee lease and a deed of sale, and the present suit was brought by the special respondents to recover the penalty, in other words, to have the half share made over to themselves on payment of the price paid by the parties to whom it had been already sold.

Before this suit, however, was instituted, the defendants cancelled the sale and the dur-putnee lease.

The Principal Sudder Ameen held that the defendant was bound to a specific performance of his contract, and decreed against him.

We think that this judgment was wrong. Special appellant, doubtless, covenanted not to sell his share to any one but his co-sharers, and his conveyance to Matabuddeen and Shurnarain was, therefore, a breach of that contract; but as the conveyance was cancelled before this suit was instituted, the parties to the contract are now in the same position as they were before the alienation was made. Special appellants are still the owners of the share and are still bound by the contract. We think, therefore, that, as the agreement between the parties is, by the cancelment of the sale and the dur-putnee lease, in the same state as it was before these conveyances were made, the special respondents can have no claim to a specific penalty. His remedy, if any, is to seek for damages for any injury he may prove himself to have sustained.

But even had the sale not been cancelled, we doubt whether special respondent would have been entitled to void that sale, and to make an innocent purchaser, who bought the land *bonâ fide*, without any knowledge of the secret agreement between the parties, suffer. His only remedy, even in that case, we think, would have been an action for damages.

The dur-putnee lease cannot be looked upon as a sale, nor do we find by the terms of the contract with plaintiff that the defendant is barred from making any arrangement for his lands short of sale.

In no point of view, therefore, can this judgment of the Lower Court be sustained, and we therefore decree the appeal with costs and interest.

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The 9th July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Arbitration—Appointment of Arbitrators.

Regular Appeals from decision passed by Mr. O. W. Malet, Judge of Beerbhoom, dated the 14th September 1863.

Case No. 578 of 1863.

Troyluckho Nath Roy (Plaintiff) *Appellant,*

versus

The Collector of Beerbhoom, on the part of the Court of Wards and others (Defendants) *Respondents.*

Suit laid at rupees 9,724-4.

Mr. R. T. Allan and *Baboo Gopal Lall Mitter* for Appellant.

Baboos Kishen Kishore Ghose, Jugodanund Mookerjee, and *Unnodapershad Banerjee* for Respondents.

Case No. 579 of 1863.

Loke Nath Roy (Plaintiff) *Appellant,*

versus

The Collector of Beerbhoom, on the part of the Court of Wards and others (Defendants) *Respondents.*

Suit laid at rupees 1,387-12.

Baboo Greesh Chunder Ghose for Appellant.

Baboos Kishen Kishore Ghose, Jugodanund Mookerjee, and *Unnodapershad Banerjee* for Respondents.

Case No. 584 of 1863.

Huronath Roy (Defendant) *Appellant,*

versus

Kashee Nath Roy and others (Defendants) *Respondents.*

Baboos Sreenath Doss and *Kishen Succa Mookerjee* for Appellant.

Baboos Unnodapershad Banerjee, Kishen Kishore Ghose, and *Jugodanund Mookerjee* for Respondents.

Before a Judge refers a case for arbitration, he should ascertain whether the persons nominated are willing to accept the office; and till he has done so, any nomination of an arbitrator by him, without the application or consent of the parties, is illegal. But when a case has once been referred to arbitration, after the preliminary steps have been properly taken, the Judge has the sole power of appointing fresh arbitrators in the room of such as refuse to act.

Quære.—Whether a Judge, proceeding under Section 319 Act VIII of 1859 to appoint arbitrators, is not bound to appoint, in the room of the arbitrators who resign, an equal number of new arbitrators, unless the parties consent to submit their case to a smaller number.

Loch, J.—The plaintiff, Kashee Nath Roy, brought a suit to recover the amount of an ungeekarpattro executed by one Kisto Chunder Chuckerbutty, claiming the whole sum as due to him.

Troyluckho Nath Roy admitted as plaintiff, claimed a share in the money as belonging to the whole family and not to Kashee Nath solely.

Loke Nath Roy also filed a separate suit, claiming a share of the money on the allegation that it was the joint property of the family.

Huro Nath Roy intervened, claiming the whole of the money as due to him alone.

There appears to be no denial as to the existence of the debt, though some question as to the state of the accounts.

The parties agreed to submit the case to arbitration, and an award was passed on 22nd August 1863, corresponding with 7th Bhadoor 1270, in favor of Kashee Nath Roy, which was confirmed by the Judge on 14th September following.

In the appeals which have been preferred to us, it is only necessary to consider at present a preliminary point, whether the arbitrators were appointed according to law, and if not, whether their award must not be cancelled as altogether without jurisdiction.

The objections taken are as follows:—On 28th Assar 1270, corresponding with 11th July 1863, the parties by separate petitions agreed to submit their claims to the arbitration of the following persons—Roop Lall Khazanchee, Nubin Chunder Sircar, Suroop Chunder Hazra, and Bhyrub Chunder Paleet. The Judge, on 14th July 1863, corresponding with 31st Assar 1270, held a proceeding directing the record to be sent to the arbitrators, and appointing Roop Lall as the umpire. On 22nd July 1863, corresponding with 7th Srabun 1270, two of the parties nominated, Suroop Chunder Hazra and Bhyrub Chunder Paleet, declined to act, and on 29th July the Judge admitted the excuse and appointed Becharam Mookerjee as a third arbitrator in the place of the two who had declined to act. On the refusal of Suroop Chunder Hazra and Bhyrub Chunder to act, a petition was presented to the Judge by Huro Nath, Loke Nath, and Troyluckho

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Nath, objecting to the two other arbitrators as servants and dependants of the defendant, and praying that the suit might be disposed of by the Court on its merits. This application was rejected, as the Judge was of opinion that Roop Lal was not a servant as alleged.

When the arbitrators thus appointed took up the case on 28th of Srabun 1270, corresponding with 12th August 1863, these parties objected to their disposing of the case, and prayed that the record might be returned to the Judge. The arbitrators, however, refused to comply with their request, and proceeded to dispose of the case, and sent in their award dated the 7th Bhadur 1270, corresponding with 22nd August 1863. Within ten days the parties filed a petition objecting to the award on the ground that the arbitrators were not those approved by them; that Becharam was not chosen by them; that he was a common person; and they could not be bound by any award he might make.

It is urged by the appellants that, under Section 314, the Judge had no authority of his own motion to appoint Becharam Mookerjee to act as arbitrator in the room of the two persons nominated by them, who had declined to accept the office; that, as he had been appointed by the Judge without their application or consent, and they had strong objections to the others, now that their own nominees refused to act, the constitution of this Arbitration Court was altogether irregular, and its award not binding.

On the other hand, it is urged that, under the provisions of Section 319, the Judge had authority to appoint an arbitrator in the room of one refusing to act; that the Judge on receipt of the petition, had, on 14th July 1863, referred the case for decision to the arbitrators under Sections 315 and 316, and that, when a case was once thus referred, the parties had no authority in regard to the appointment of new arbitrators; that the provisions of Section 314 related to an earlier stage of the proceedings, *viz.* before the case had been referred, for it was presumed that, when parties were nominated to act as arbitrators, they were so after having been consulted by those who nominated them, and the provisions of this Section were only applicable when such parties came forward at the time the petition was presented, or before the Judge had taken any action on the petition and declined to accept the office.

By Baboo Jugodanund Mookerjee it is argued, on the same side, that the Judge is at liberty to proceed under Section 314, if he have cause for supposing that any of the parties nominated is unwilling to act, and to serve a notice upon them, and if the nominee decline to act, the Judge cannot appoint another party without the consent of the parties to the suit. But it is not incumbent on the Judge to proceed under this Section. He can at once, under Section 315, refer the case to arbitration, and then it does not remain with the parties to nominate another arbitrator, should the person or persons named by them refuse to act; but the Judge, proceeding under Section 319, has alone authority to appoint fresh arbitrators.

We do not doubt that, when a case had once been referred to arbitration after the preliminary steps have been properly taken, the Judge, under Section 319, has the sole power of appointing fresh arbitrators in the room of such as refuse to act. But we are by no means satisfied with the arguments pressed upon us that the view of the law taken by the pleaders for the respondents is correct. If once a party has *accepted* the office of arbitration, and the case have been referred for an award, such person may, at any time, refuse to act, and in such case, the Judge will then appoint another person under Section 319, without consulting the wishes of the parties. But we do not think that a Judge can legally refer a case for arbitration till he has ascertained whether the persons nominated by the parties are willing to act. The wording of Section 314 leads us to think that the persons nominated by the parties to a suit to act as arbitrators should have opportunity of expressing their consent or dissent to the performance of the duty before the case is referred for decision, so that if they be unwilling to accept the office the parties may be able to choose other qualified persons to act for them. But if the Judge have it in his power to refer the case to arbitration at once, the nominees can have no opportunity of expressing their intention, and the provisions of Section 314 are altogether set aside while some person particularly obnoxious to one or other of the parties, may be appointed by the Judge, to whose award they never would willingly have submitted their case. We think, therefore, that before a Judge refers a case for arbitration, he should ascertain whether the persons nominated are willing to accept the office, and that till he have done so, he cannot refer the case under such circumstances, and any nomination of an arbitrator by him, without the application or consent of the parties, is illegal. We think also that it is open to question whether a Judge proceeding under Section 319 to ap-

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point arbitrators is not bound to appoint in the room of the arbitrators who resign, an equal number of new arbitrators, unless the parties consent to submit their case to a smaller number.

As two of the parties nominated by the appellants declined to act as arbitrators as soon as they heard that they had been nominated, and the parties had no opportunity given them of appointing others, we think that the Arbitration Court which disposed of this case, was not legally constituted, and, therefore, that the whole of their proceedings must be quashed and the case remanded to the Judge, who will replace it on his file and try the case *de novo*. The Judge will allow the parties to file any further evidence which they may consider necessary. The appeals are decreed.

The 9th July 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Hindoo Law of Inheritance—Unborn son.

Case No. 47 of 1864.

Regular Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 30th April 1863.

Mussamut Goura Chowdhrain (Plaintiff) *Appellant,*

versus

Chummun Chowdry and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboos Banee Madhub Banerjee* and *Roop Nauth Banerjee* for Appellant.

Messrs. R. V Doyne and *C. Gregory*, *Moonshee Ameer Ali*, and *Baboos Kishen Kishore Ghose*, *Unnoda Pershad Banerjee*, and *Dwarka Nath Mitter* for Respondents.

Proprietary right is created by birth, and not by conception. A child in the womb takes no estate. In cases where, when the succession opens out, a female member of the family has conceived, the inheritance remains in abeyance until the result of the conception can be ascertained. If the child be still-born, the estate goes not to her heir, but to the heir of the last owner.

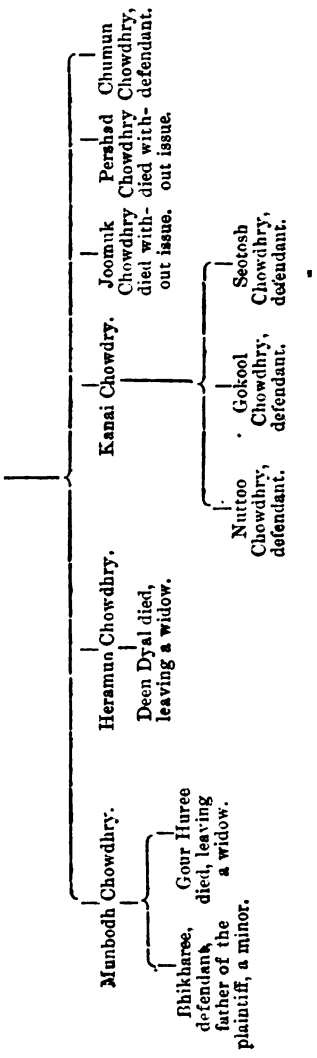
A son or grandson's right of prohibition to his unseparated father making a gift, donation, or sale of effects inherited from his grandfather, cannot be exercised in favor of an unborn son.

Kemp, J—The plaintiff is the mother of Bisheshur Dyal, a minor of tender age; the defendants are the father of the minor and the other male members of the family, which has for a long time been domiciled in the Tirhoot district, and is admittedly governed by the Mithila Law.

The suit is for one-third of the ancestral and self-acquired property, and for the reversal of a deed of compromise executed by the father of the minor, dated the 19th June 1860. The suit is valued at Rupees 2,02,-070-2-3.

It is admitted that, for the purposes of this suit, Banee Chowdry may be taken as the ancestor, and that it is unnecessary to trace the family pedigree higher. The tree below will show the position of the parties to this suit.

Banee Chowdhry had two wives; by the first, two sons; by the second, four sons.



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The plaint declares that the deed of compromise executed by Bhikaree Chowdhry, father of the minor, was the result of undue influence exercised over him; that it is prejudicial to the interests of his son, the plaintiff; and, therefore, invalid.

The defendants, with the exception of the father, Bhikaree Chowdhry, who does not defend the suit, answer briefly to this effect.—That the present suit has been instituted by Bhikaree in the name of his wife; that at the time when the deed of compromise was executed by Bhikaree, his son, the minor plaintiff was not born; the latter is, therefore, not competent to take exception to the deed executed by his father.

That the compromise effected by the father was not prejudicial to his interests, but on the contrary, highly beneficial.

That the expenses of this suit are borne by the father, Bhikaree Chowdhry, whose suit it is; the mother of the minor, the nominal plaintiff, being a mere sham.

These are the material allegations in the pleadings, and they have been stated very much in the words adopted by the parties.

The Judge of Tirhoot tried the suit on the following issues* :—

1*st*.—Was the minor, Bissessur Dyal, born before the deed of compromise? and, if not, has he a right to set it aside?

2*nd*.—Is the whole property claimed ancestral, or only a part?

3*rd*.—Was the deed of compromise executed by Bhikaree Chowdhry through imposition or cajoling practised upon him, he being of weak intellect? Or did he execute it willingly, knowing well what he was doing? And has Bhikaree Chowdhry himself got up this suit? In any case, is such a deed of compromise liable under the Hindoo Law to be set aside?

4*th*.—Was the whole property now sued for included in the deed of compromise? if not, can plaintiff sue now for what was not included in it?

On the first issue the Judge remarks :—"That the question of fact for decision is, whether the minor was born previous to the execution of the deed of compromise or not." The Judge observes—"That in his opinion, the balance of evidence is on the plaintiff's side, for although two of her witnesses have said that the minor was born in 1268 (the deed of compromise being dated Assar, 1267), the Brahmin, who drew the horoscope, which is filed and attested by him, says that the birth took place in Aghran 1267, Fuslee, the other witnesses say that the child was born not quite three years ago, and as the appearance of the child, who was produced in Court, is that of a child of about three years old, I think there is every reason to believe that he was born previous to the date of the deed of compromise."

The *first* issue was, therefore, given in favor of the plaintiff.

On the *second* issue the Judge held that, "with the exception of two properties, *viz*. Mouzahs Bhukwara and Bulta, the remaining properties claimed are not ancestral." It is unnecessary to state the reasons of the Judge in detail, as the judgment of this Court turns on another and distinct point.

On the *third* issue, the Judge held that "there can be no doubt that Bhikaree Chowdhry, the father of the minor, executed the deed of compromise willingly; that the relinquishment of certain properties under the deed of compromise cannot be regarded as an alienation; that Bhikaree, under the deed, received a share more than equivalent to what he would be entitled to on a fair partition, so that he cannot be said to have wasted or made away with ancestral property."

With reference to the question, whether the present suit was got up by Bhikaree Chowdhry, the Judge observes that "there is strong reason for believing that this suit has, in fact, been got up and carried on by Bhikaree Chowdhry himself, for one of the defendant's witnesses, Bhikaree Ojah, states that he saw him in Calcutta, and on asking him 'what he had come for,' was told that he had come to look 'after the appeal lodged by his wife against the order* striking off the present case, which was passed by the Principal Sudder Ameen.' Also witnesses Odhit Tewaree and Ramkant Chowdhry state that they saw him borrow money avowedly to carry on this suit"

The Judge dismissed the suit of the plaintiff with costs.

Two appeals have been preferred to this Court. The plaintiff appeals on the merits; the defendants, under the provisions of Section 348 of the Code of Civil Procedure,

* These issues were framed by the Principal Sudder Ameen and were agreed to by the parties. The suit was subsequently transferred to the file of the Judge and tried by him.

* The suit was struck off because the mother had not obtained a certificate under the provisions of Act XL of 1858. On summary appeal, the High Court directed that the suit might proceed in its present shape.

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appeal against the finding of the Judge, that the minor was born after the date of the deed of compromise.

The plaintiff, appellant, is represented by Mr. Allan; the defendants, respondents, by Mr. Doyne and Baboo Dwarkanath Mitter.

Before proceeding to decide the cross appeal preferred by the respondents, Mr. Allan, with the permission of the Court, briefly opened the case, contending that the compromise executed by Bhikaree Chowdhry was not binding upon his son, inasmuch as even if this Court should find on the evidence that the son was born after the deed was executed, still it must be admitted that at the time of its execution, the son was *in utero matris*, and that as, according to the Hindoo Law and the decisions of the late Sudder Court, the birth and the conception of a son are one and the same, consequently the act of the father, which in the present case amounts to a partition of the property on terms prejudicial to the son, is not binding upon the son. Upon this, the Court directed the Counsel for the respondents to argue their cross appeal. Mr. Doyne, after remarking that the pleader for the appellant had introduced an entirely new element in the controversy in amendment of the issue laid down by the Lower Court, inasmuch as the suit went to trial below on a pure question of fact, whether the son of Bhikaree was born before or after the date of the deed executed by Bhikaree, proceeded to argue that it is only by birth that the son acquires any right; that the father can alienate with the consent of the son in existence; and that it is impossible to obtain the consent of a son *in utero matris*.

Mr. Doyne further remarked upon the inconvenience of the principle maintained by Mr. Allan, which is equivalent to debarring a father from making any alienation, or assenting to any portion while there was a possibility of his wife being *enceinte*, to say nothing of the contingency whether the child were a son or a daughter, or still born.

Baboo Dwarkanath Mitter followed on the same side, and contended that, at the time of the deed of compromise, which amounts to a partition, there was no party interested in the partition which was between cousins and of a joint property, who was unrepresented; it was, therefore, quite unnecessary, even admitting that conception had taken place at the time of the partition, to await the result. That in cases, such as a partition between brothers where the widow of a brother is *enciente* and his interests are not represented, it may be that, under the Mithila Law, it would be necessary to await the result, but in this case all the parties were fully represented. That the son in the womb does not take an actual vested interest; that he is not joint owner with the father, who is entitled to alienate without question before the birth of the son.

We are of opinion that, though there may be grave doubts, taking into consideration the usual period of gestation, whether the son was conceived when the deed of compromise was executed by the father, it is immaterial for the purposes of this suit to consider this question. The evidence shews that the son was born after the date of the deed of compromise, and that whether he was at that time conceived or not, we think that the father was competent to execute such deed prior to the birth of the son, and that the latter is not in a position to question it. The precedent cited by Mr. Allan has no bearing upon this case. That was a decision for a certificate of administration, and turned upon a right to inherit under the Mitakshara. (*See* the Treatise on Inheritance, Section 1, paras. 23-27, and Chapter 1, Section 5, para. 2.)—It seems clear that proprietary right is created by birth and not by conception. A child in the womb takes no estate. In cases where, when the succession opens out, a female member of the family has conceived, the inheritance remains in abeyance until the result of the conception can be ascertained. If the child be still-born, the estate goes not to her heir, but to the heir of the last owner. In the present case, the partition by the deed of compromise took place between cousins. The now plaintiff being merely in the womb, had no property in himself, and his possible future interest was fully represented by his father, who was one of the parties to the arrangement. A son or grandson has a right of prohibition if his unseparated father is making a gift, donation, or sale of effects inherited from his grandfather, (Mitakshara, Chapter I, Section 1, para. 27, and Chapter I, Section 5, para 9). But it is nowhere stated that such right of prohibition can be exercised by any one in favor of an unborn son. The meaning of the passage in the Vivada Chintamonee,* page 278, quoted by Mr. Allan, and which runs thus—"A son who is in the womb at the time of partition, and is born after it, shall receive his equal share from the

*Translated by Baboo Prosonno Coomar Tagore.

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separated co-heirs out of their estate," is no more than that if one of say three brothers is unrepresented at the time of the partition, being in the womb at the time of the partition and born after it, he will receive a share from the other brothers or co-sharers. (*See* Mitakshara on Inheritance, translated by Colebrook, pages 280-283.)

We cannot agree with the Judge in his estimate of the evidence. The *onus* of proving the date of the birth is on the plaintiff. The date is not given in the plaint or the written statement. It is alleged that the minor was born in Aghran 1267, Fuslee, but some of the witnesses cited by the plaintiff depose to the birth as in Aghran 1268, Fuslee. The mother has not been examined, nor has the maternal grandfather, in whose house the boy was born, or his wife who is still alive. The horoscope is, in our opinion, unworthy of credit. It is written on a flimsy piece of Serampore paper, and bears inherent marks of its having been prepared for the purposes of this suit. Some of the male relations of the parties have deposed to the fact that the boy Bissessur Dyal was born after the 19th June 1860, the date upon which the compromise was executed. A Brahmin, the alleged writer of the horoscope, has been examined. There is no good reason given why this person should have accompanied the lady to the house of her maternal grandfather in the Bhaugulpore District, situated at a distance of more than one hundred miles from his own house. His age, when he was examined, was 30 years, and yet he deposes that he was in the habit of drawing horoscopes, which require elaborate calculation and reference to Almanacs and to the position of the stars at the time of the birth of the child, whose future fate in life is the subject of the calculation, when he was ten years old.

On the whole, after duly weighing the probabilities and considering the whole evidence which has been read to us *in extenso*, we can come to no other conclusion than that the boy was born after the deed was executed, and that, consequently, he is not in a position, through his mother, to question it.

We, therefore, think that the Judge was right in dismissing the plaintiff's suit, though we do not think it necessary to go into the particular reasons which led him to that conclusion.

The appeal is dismissed with costs and interest, payable by the appellant.

The 11th July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Sale—Breach of Contract—Specific Performance.

Case No. 32 of 1864.

Regular Appeal from a decision of the Judge of Patna, dated the 18th September 1863.

Koonrag Bahadoor and another (Defendants) *Appellants,*

versus

Ram Buksh Sahoo (Plaintiff) *Respondent.*

Baboo Unnoda Pershad Banerjee for Appellants.

Baboos Onookool Chunder Mookerjee and *Taruck Nath Sein* for Respondent.

Where a vendor received the majority of the purchase-money in the shape of old debts recited in the deed; and for the remainder of the consideration, the vendee tendered a cash payment which the vendor refused,—HELD that the vendee was entitled to sue for specific performance or for breach of contract.

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Seton-Karr, J.—This case was once remanded by the High Court, on the 20th of May 1863, in order that the Lower Court might try whether the plaintiff had really offered to perform his part of a certain negotiation, and to complete a sale of a property of which the deed had been drawn out in his favor by one Hossainee Jan, from whom the appellants had purchased the same property by a subsequent deed of sale.

The case was simply this. On the 6th of December 1859, a deed of sale of 16 mouzahs was drawn up between the proprietor Hossainee Jan and the plaintiff. On the 24th of the same month, the same property was sold, by the same proprietor, to the defendants, appellants. The plaintiff alleged that, having had previous dealings with Hossainee Jan, a sum of 11,600 rupees was found to be due on them; that the deed of sale recited the full price of the property to be 12,445 rupees, in regard to which the previous loans were to be cleared off and were to be taken as part payment, while only 845 rupees was receivable from the plaintiff in cash; and that, when he tendered this sum, the tender was refused, and the property was illegally sold to the defendants.

Hossainee, whose defence was at first that the plaintiff had never tendered the remainder of the consideration, and, in fact, had failed to complete his share of the transaction, has now, it is stated, gone over to the plaintiff, and has admitted that he did offer to complete the sale.

The Lower Court has found on the evidence that the plaintiff did all in his power to complete the sale, but that Hossainee Jan broke it off under the bad advice and interference of a mooktear named Hurdyal, who demanded an exorbitant sum as brokerage for his share in the affair. The sale to the defendants has, of course, in this view been set aside, and that to the plaintiff restored on payment by him of the sum agreed on, or 845 rupees within one month.

We have heard the evidence which has been fully and carefully taken by the Judge, and we concur with him in his estimate of the same. The witnesses Gridhari Lal and others clearly show that the plaintiff, between the 6th and the 24th of December, tendered 8,451 rupees; and this, as far as as he was concerned, did complete the sale, whereupon he was put off with excuses, while immediately afterwards Hurdyal wanted the sum of 1,500 rupees as brokerage; but the plaintiff offered to give him 450 rupees in addition to 50 rupees which the broker had already received.

Against this testimony we cannot set that of the witnesses for the defence, who say that plaintiff was willing to give 300 rupees as brokerage, but wanted to deduct this sum from the last payment of 845 rupees due to the vendor, Hossainee Jan. After this the witnesses say that the registration being still incomplete, the transaction was broken off, and the property was sold to the appellants for 16,000 rupees.

We say that we discredit this latter testimony, as the Judge did. That the plaintiff should fail to tender the comparatively small sum of 845 rupees, which only remained to complete the bargain for a valuable property, is most unlikely. That Hossainee Jan having little to receive in cash from the plaintiff, the major part of the consideration being made up of old debts, should, like so many females in this country, listen to bad advice, and be tempted by another offer of 16,000 rupess in money, to repudiate the first transaction, is we regret to say, most likely; and, on the whole case, we can have no doubt that the plaintiff did all that was required of him, and that the failure is due solely to the evil influence of Hurdyal and the exorbitancy of his demands.

The pleader attempted to argue that, even on the evidence if credited, the vendor had a legal right to refuse to complete the sale and to give a title to a third party such as the appellants; but we hold such a plea utterly bad in law.

The vendor had received the majority of the purchase-money consisting of old debts which the deed itself carefully recited, and the offer of the cash payment completed the matter for the plaintiff, and gave him a right to sue for specific performance or breach of contract.

We affirm the decision of the Judge, and dismiss this appeal with costs.

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The 11th July 1864.

Present:

The Hon'ble W. Morgan and Sumboonanth Pundit, *Judges.*

Mortgage.

Cases Nos. 2957 to 2959 of 1863.

Special Appeals from decisions passed by Syud Izzut Hossein Khan Bahadoor, Principal Sudder Ameen of Sarun, dated the 26th August 1863, *modifying decisions of Baboo Gobind Chunder Sandel, Moonsiff of that District, dated the 16th June* 1863.

Dhoree Roy and another (Defendants) *Appellants,*

versus

Buldeb Narain Sing (Plaintiff) *Respondent.*

Baboo Kishen Succa Mookerjee and *Kali Kishen Sein* for Appellants.

Baboo Roopnath Banerjee for Respondent.

A mortgage made by way of security for money advanced, remains a mortgage until the debt is satisfied, and the mortgagee-creditor has every right to sue to obtain a decree and sell that which is held by him as security for his money without any regard to the proceeding of any other subsequent mortgagee or purchaser. A purchaser at a sale in execution of such a decree under a prior mortgage, as well as the original holder of a prior mortgage, have rights far superior to those of any other mortgagee or purchaser of a subsequent date. A subsequent purchaser, by payment of an earlier mortgage and obtaining a decree for the money so paid, does not acquire any rights belonging to that mortgage. His payment was a voluntary act, and his decree against his vendor was a personal one for a simple debt not secured by any security connected with any portion of the land in dispute.

Pundit, J.—Dhoree Roy, special appellant in cases Nos. 2957 and 2958 of 1863, brought an action for possession of certain properties upon two deeds of conditional sale foreclosed. In one of these cases Lalljee Roy, special appellant in case 2959 of 1863, objected on the ground of some money being due to him on a zur-i-peshgee lease of some portion of the properties claimed by Dhoree, of date prior to that of the deeds of sale to the said Dhoree. Buldeb, the substantial respondent in case 2957, objected to Dhoree's claim with regard to some of the property. He pleaded that, having purchased some property from the vendor of Dhoree, he found that it was encumbered with a mortgage of date prior to that of the said plaintiff's deed; that he was accordingly compelled to pay this debt, and then sued to recover it from his vendor, obtained a decree, and, in execution of it, purchased the rights and interests of the said vendor in certain property, forming a portion of hose properties which are foreclosed by Dhoree Roy. He urged that having paid money for an earlier mortgage, the foreclosure of one of subsequent date by Dhoree would not affect the defendant's rights supposed to arise to him from the earlier mortgage paid for by him.

To set aside these deeds in favor of Dhoree and for other purposes against others, Buldeb, on these very grounds of his aforesaid defence, brought an action. In this case, other lands and other persons besides Lalljee and Dhoree and the lands claimed by the latter, were included. All these cases were tried together. The Court of first instance decreed the claims of Dhoree, subject to the condition of his paying to Lalljee his due. The case of Buldeb was accordingly dismissed as far as it affected the claims of Lalljee and Dhoree, and decreed for the rest. Buldeb appealed against this decree only in his own case, and not in the two cases in which he was defendant. Deokee Nundun, another defendant, appeared in the Lower Court, and objected to some portion of Dhoree's claim. He pleaded that he held a mortgage for some property in dispute earlier than those of Dhoree; that having occasion to bring an action for the money secured by this mortgage, he obtained a decree, and, in execution of it, had bought the rights of his mortgagors in the property so pledged for his dues. His plea was that, irrespective of the date on which he had occasion to sue, obtained the decree and sold in execution, his mortgage rights are superior to those of Dhoree Roy, though the latter might have foreclosed before. The Lower Court having disallowed the plea of this defendant, he also appealed. This appeal and that of another party, who does not now appear, were heard along with the appeal of Buldeb.

The Lower Appellate Court held that the vendor of all the parties, having made this earliest mortgage paid for by Buldeb, could not, before his discharging this first mortgage, pass the property claimed by Buldeb, or any right in it, to any other person. The Court further held that the mortgage to Lalljee was also subsequent to this mortgage paid for by Buldeb, but that to

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Deokee was prior to that of Dhoree. It accordingly reversed the orders of the first Court in all the three suits, decreed the appeal of Buldeb and Deokee, dismissed the suit of Dhoree, and overruled the claim of Lalljee.

Against this decision Dhoree Roy, with reference to the two appeals decreed against him by the Lower Appellate Court, appeals in two cases, and Lalljee appeals in the third on the ground that, if a decree be given to Dhoree, he should be subject to the liability of paying to the said Lalljee the money which was decreed to him by the first Court. As against Buldeb, the objections of both the appellants are founded on the same grounds.

Now, it is clear that the prior mortgages in favor of Deokee and Lalljee give rise to rights, which the holder of subsequent deeds of conditional sale cannot legally pass over on the ground of having foreclosed such mortgages, or on the ground that the decree for money was obtained by Deokee against his debtor after foreclosure by the said Dhoree. The mortgage, made by way of security for money advanced, remains a mortgage until the debt is satisfied, and the mortgagee creditor had every right to sue to obtain a decree and sell that which was held by him as security for his money without any regard to the proceeding of any other subsequent mortgagee or purchaser. The purcharer at a sale in execution of such a decree under a prior mortgage, as well as the original holder of a prior mortgage, have rights far superior to those of any other mortgagee or purchaser of a subsequent date. Buldeb, however, by his payment of an earlier mortgage and obtaining a decree for the money so paid, does not acquire any right belonging to that mortgage. His payment was a voluntary act, and his decree against his vendor was a personal one for a simple debt, not secured by any security connected with any portion of the land in dispute. We therefore decree with costs the appeal of Lalljee in No. 2959 of 1863, and so likewise the appeal of Dhoree in No. 2957 of 1863. Accordingly, the decree of the Lower Appellate Court in favor of Buldeb, on his appeal, is reversed with costs, and that of the first Court, dismissing so much of the suit of Buldeb as was against Dhoree and Lalljee, as well as the decree of the first Court in the suit of Dhoree in so far as it did not affect the rights of Deokee Nundun and of Lalljee, are upheld. Both these defendants will recover their costs of both the Courts from both the plaintiffs. With regard to Lalljee, the order of the first Court in his favor is revived. We further order that the Special Appeal No. 2958 of Dhoree Roy as against Deokee be dismissed without costs, as no one appeared to oppose this appeal.

The 11th July 1864.

Present :

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Special Appeal — Jurisdiction of Small Cause Court—Damages.

Case No. 3195 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Mymensingh, dated the 4th July 1863, *reversing a decision of the Moonsiff of that District, dated the 24th March* 1863.

Chundy Persad Doss (Plaintiff) *Appellant,*

versus

Kasseenath Doss (Defendant) *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Nil Madhub Sein for Respondent.

No special appeal lies in a suit for damages for breach of a private arrangement by which the parties agree to control the terms of a decree, where the amount is within the jurisdiction of the Small Cause Court.

Morgan, J.—The subject of this suit was as follows:—A decree was obtained in the Court of the Collector for a certain sum, and would, in the ordinary course, have been executed for that sum. The parties, however, for purposes of their own, chose to control the terms of that decree by a priv te agreement to the effect that the decree should not be executed for more than a certain sum. Ultimately, the decree was executed for the sum for which it was given. The present suit is brought in the Civil Court to recover damages for the breach of that arrangement; and such a suit, when the damages are below a certain sum, is clearly confined to the jurisdiction of the Small Cause Court, and is, therefore, a suit of a nature in which the right of special appeal is taken away.

The special appeal is accordingly dismissed with costs.

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The 11th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Judgment of Appellate Court.

Cases Nos. 3317 and 3318 of 1863.

Special Appeals from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 31st August 1863, reversing a decision of the Moonsiff of that District, dated the 8th October 1860.

Case No. 3317.

Lallah Sookloll Sing (Plaintiff) *Appellant,*

versus

Bunsheedhur and others (Defendants) *Respondents.*

Mr. J. Baptist for Appellant.

Baboos Dwarkanath Mitter and *Chunder Madhub Ghose* for Respondents.

Case No. 3318.

Sheikh Noor Ally (Defendant) *Appellant,*

versus

Lallah Sookloll and others (Plaintiffs) *Respondents.*

Moulvie Aftaboodeen Mahomed for Appellant.

Baboo Kally Prosunno Dutt for Respondents.

An Appellate Court is bound to give the reasons for its judgment when it differs from the judgment of the Lower Court.

Bayley, J.—These special appeals are, it is admitted, so connected that they should be tried together.

The plaintiff in the suit, Sookloll Sing, sued for possession of certain lands under a deed of sale, dated 13th November 1858, and to set aside a mokurruree lease, dated 24th December 1855, and a deed of sale conveying these mookurruree rights, dated 27th March 1859, as fraudulent and collusive.

The whole question turned upon whether the deeds sought to be set aside were fraudulent and collusive, or not.

The mokurruree lease was in the name of Ali Nawab. The deed of sale of that mokurruree was as from Ali Nawab to Bunsheedhur, and there was a ticca lease in the names of Hunsraj and Peary Lall.

The first Court found that the mokurruree lease and the sale of the rights it gave were both collusive and untrue, and held them to be null and void. In this view, it gave plaintiff a decree on his title by purchase, maintaining the ticca as in the name of Peary Lall subject to plaintiff's purchase.

The first Court came to this conclusion after a most careful and elaborate consideration, in detail, of the evidence, documentary and oral, and came to a fully reasoned conclusion on the whole of that evidence.

The Lower Appellate Court, not following this course, nor meeting even in partial detail the more substantial and important grounds on which the first Court went, reversed its decree, merely stating, "while for the purpose of refuting the aforesaid documents, the plaintiffs have adduced no *reliable* evidence to show that the mokurruree lease was executed by collusion and deceit."

The plaintiff's suit being dismissed on appeal under this view, plaintiff has appealed specially, urging, amongst other grounds which are substantially upon the evidence, the one of law that the Lower Appellate Court has erred in procedure in law, in not stating any specific grounds for reversing the first Court's decision or meeting those grounds *in any way.*

Now, we certainly would not hold that, where the Lower Appellate Court has clearly found facts in evidence, a special appeal would ordinarily lie.

But, on the other hand, we cannot but consider that it is an error in procedure in law in the Appellate Court, when the first Court has gone into much detail as to its reasons for a decision, for the former not to meet any of those reasons specifically, especially when the superior Court differs. When the superior Court agrees with the Lower Court, it may, in general terms, record its concurrence, but even then it is ordinarily more satisfactory that the substantial and prominent reasons for the decision be given. But this course is essential in cases where the superior Court *differs*, in order that the party dissatisfied with the orders of the latter tribunal may know the reasons on which the judgment against him rests, and then be guided, either as to submission on account of their sufficiency, or as to appealing on account of their supposed insufficiency. It is not necessary in such a case as this that every

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ground taken by the Court below should be taken up by the Lower Appellate Court; but some of the more prominent grounds certainly should have been considered and recorded in detail here. It is slovenly and unsatisfactory in the Principal Sudder Ameen not to have done so.

Applying these views to the special appeal, we return the record to the Lower Appellate Court, in order that it may certify its reasons in detail, and avoid a repetition of the error now referred to.

The 11th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Mortgage—Ejectment.

Case No. 3349 of 1863.

Special Appeal from a decision passed by Mr. W. T. Tucker, Officiating Additional Judge of Behar, dated the 18th of August 1863, confirming a decision of Baboo Tarakant Bidyasagur Bhuttacharjee Roy, Principal Sudder Ameen of that District, dated the 22nd November 1862.

Khajah Mahomed Hossein Khan *alias* Khaja Meerunjan, father and guardian of Khajah Wajid Khan (Defendant) *Appellant,*

versus

Sheikh Nizar Ali (Plaintiff) and Mussamut Soojeea (Defendant) *Respondent.*

Moulvie Aftaboodeen Mahomed and *Moonshee Ameer Ali* for Appellant.

Mr. C. Gregory and *Baboos Debendro Narain Bose* and *Chunder Madhub Ghose for Respondent.*

Where an auction-purchaser at a sale in execution of a mortgagor's rights, forcibly dispossesses the mortgagee, the mortgagor is not liable for the purchaser's illegal acts. The mortgagee should have retained possession and taken measures to prevent forcible dispossession or to recover possession against the purchaser.

Jackson, J.—The plaintiff in this suit, Nizar Ali, is mortgagee of Mouzah Sahooda, under a zur-i-peshgee lease, dated 18th June 1851, from the defendant Khajah Mahomed Hossein Khan *alias* Khajah Meerunjan. This Mouzah was subsequently sold in execution of a decree against that defendant, and on 19th of July 1860 was purchased by the other defendant, Mussamut Soojeea. Plaintiff alleging that he has been dispossessed by Mussamut Soojeea, sues both the mortgagor and the auction-purchaser, to recover the principal and interest due on the sum lent under the mortgage. Both the Lower Courts have decreed the suit as against the mortgagor, Khajah Mahomed Hossein, and dismissed it as against the auction-purchaser.

It is, on special appeal, contended before us that the auction-purchaser, having bought the estate with distinct notice of the mortgage, and having dispossessed the mortgagee, plaintiff, is liable to make good to plaintiff the amount due under the mortgage, and that the mortgagor is no longer liable. It is, on the other hand, urged for the mortgagee, that the mortgagor having allowed his rights and interests in the estate to be sold, and thereby allowed the purchaser to dispossess, the mortgagee is liable to a suit for the recovery of the sum lent on the mortgage.

The terms of the mortgage are that the mortgagee shall be placed in possession of the mortgaged estate and shall recover the loan from the usufruct of that estate. The plaintiff was accordingly put into possession of the estate and remained in possession for nine years. The subsequent purchase of Mussamut Soojea was made with full notice of the mortgage, and was subject to it. There is nothing in these circumstances to show that the mortgagor has, in any way, ever broken his contract. The mortgagee has been forcibly dispossessed of the estate by the purchaser, who had no right to dispossess him: the mortgagor is not liable for the purchaser's illegal acts. The mortgagee should have retained possession and taken measures to prevent forcible dispossession or to recover possession against the purchaser. He is bound, under his deed, to look to the usufruct of the estate for the amount lent on mortgage, and he cannot take action against the mortgagor, solely on the ground that the purchaser of the mortgagor's rights has dispossessed him.

It is said that the mortgage was granted benamee in the name of the real mortgagor, Khajah Mahomed Hossein Khan's son, and that a fraudulent kubala was executed previous to the mortgage, under which the rights of Khajah Mahomed Hossein Khan were transferred to the son, and that the kubala has been set aside as being a fictitious transfer. This, however, would not affect the rights of the mortgagor. His contract of mortgage was with the owner of the estate, Khajah Mahomed Hossein Khan, though in the name of his son. Mussamut Soojeea having purchased the rights of the said Mahomed Hossein Khan, holds the estate subject to his

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mortgage. It is said that there are other sharers in the estate, but this is not the ground on which this suit was preferred, and no issue or decision has been recorded on this new ground. The suit was brought on the sole allegation of dispossession, and on that ground the plaintiff is not entitled to recover from the mortgagor.

The decision of the Lower Courts must be reversed, and the suit dismissed with all costs.

The 12th July 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Mortgage—Redemption—Interest.

Case No. 2535 of 1863.

Special Appeal from a decision passed by Mr. E. F. Lautour, Judge of Patna, dated the 1st May 1863, *affirming a decision of Moulvie Syud Sukhawut Hossein Khan, Principal Sudder Ameen of that District, dated the* 14*th February* 1863.

Gopee Loll and others (Defendants) *Appellants,*

versus

Beebee Mohafuzzun (Plaintiff) *Respondent.*

Baboos Kissen Succa Mookerjee and *Chunder Madhub Ghose* for Appellants.

Baboo Kalee Kissen Sein for Respondent.

A mortgagor is not entitled to a decree for redemption so long as anything is due upon the mortgage.
Mode of computing interest explained.

Morgan, J.—We must remand this case in order that the account may be properly taken.

It is a suit for redemption, and the Judge held that the mortgagee was not to be allowed interest on the bye-bil-wuffa money, because he had declared that he had nothing to receive on that head on the 21st May 1861, that is, when he petitioned in the suit for foreclosure. The Judge treats the appellant as estopped by his act from claiming interest. He was clearly wrong in that view. The appellant was entitled to interest on his principal money, and the Court should calculate the amount of such interest. Then, besides that, the mortgagee should also be allowed credit in respect of the Government revenue paid by him from 1248 to 1269. Then, in computing the interest on the bond debts, the computation has been erroneously confined to a sum not exceeding the amount of the bond. The full interest on those debt should be calculated. When these corrections in the mortgage account have been made and the balance ascertained, the suit may then be disposed of. If the Court shall find anything due upon the mortgage, the plaintiff will clearly not be entitled to obtain a decree in the present suit for redemption.

The 12th July 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Joint Family Property (Suit for share in)—Limitation.

Case No. 2487 of 1863.

Special Appeal from a decision passed by Mr. O. Toogood, Judge of Cuttack, dated the 24th April 1863, *reversing a decision of the Moonsiff of Dhamnuggur, dated the* 30*th August* 1862.

Madhub Dyal (Defendant) *Appellant,*

versus

Punchanun Dyal (Plaintiff) *Respondent.*

Baboo Grish Chunder Ghose for Appellant.

Baboo Nil Madhub Sein for Respondent.

In a suit for a share in joint family property, the Court should enquire particularly into the evidence of the mode of enjoyment of this property, with a view to ascertain whether the plaintiff has, within 12 years or within what time, received anything on account of his share of the property. If the plaintiff is shown to have received some portion of the property or otherwise to have been in joint possession, limitation will apply.

Morgan, J.—We must remand this case. In addition to the objections urged, there is this—It does not satisfactorily appear that the Court had in mind the provision of the Law of Limitation applicable to this subject, that is to say, the provision contained in Act XIV of 1859, Section 1, Clause 13.

It is a suit by a person claiming the right to share in joint family property. The answer set up to that claim is, 1st—that there was in this family something in the nature of a right of primogeniture, a custom by which the eldest son succeeds in exclusion of the others. Such a custom, however, does not seem at all to have been enquired into and disposed of.

Besides that, there is set up, as a defence, a separation of the joint family in the year 1842, or previous to that, and sole possession by the defendants of this property ever since. The Court of first instance decided the case in the defendant's favor on this latter ground.

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The Lower Appellate Court reverses the decision and gives the plaintiff a decree, referring to several decisions of the Sudder Court which ruled (what is clear law) that in a joint Hindoo family the presumption is that the property is the joint property of all the members, although the name of one only may be used. There is no doubt of that being a *primâ facie* presumption. But it is not one that governs the decision of this case. The Court should have enquired particularly into the evidence of the mode of enjoyment of this property, with a view to ascertain whether the plaintiff has within 12 years, or within what time, received anything on account of his share of the property. If the plaintiff is shown to have received some portion of the property, or otherwise to have been in joint possession, the Court should hold that the Law of Limitation does not apply. On the other hand, if the plaintiff has been excluded from all interest in this property for 12 years and upwards, the Court should apply the provision of the Clause referred to.

We must remand the case in order that the Court may dispose of this question of limitation, and also enquire into and dispose of the question respecting the usage of the family for one son to succeed in exclusion of the others.

The 12th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Suit for declaration of title—Estoppel.

Case No. 3321 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Cuttack, dated the 25th of August 1863, affirming a decision of the Moonsiff of that District, dated the 18th of November 1862.

Nittanund Roy and another (Defendants) *Appellants,*

versus

Bydonath Mohapathur (Plaintiff) *Respondent.*

Appellants in person.

No one for Respondent.

In a suit for declaration of title, the mere fact that the Revenue Courts decreed the registration of the plaintiff's vendor's name as a joint sharer of the estate, and that no steps were taken during 12 years to set aside that decree, cannot operate as an estoppel.

Jackson, J.—This suit was brought for a declaration of the plaintiff's title and possession in 8 annas of Mouzah Bussoopoor. The plaintiff stated that Mouzah Bussoopoor was formerly the joint estate of Brindabun Roy and Durponarain Roy, who held each an 8 anna share; that on Durponarain's death, his window, Brinda Dassee, succeeded to his share and conveyed it by gift to Bungseedhur Ghose, who again conveyed it by gift to Anund Chunder Ghose, whose son, Boistubchurn Ghose, sold it to the plaintiff.

The claim was contested by the defendants who are now special appellants, who asserted that they were entitled to, and in possession of, the whole 16 annas of Mouzah Bussoopoor, by inheritance from their grandfather Brindabun Roy, to whom alone the mouzah had belonged, and that Durponarain Roy had held no share in the estate

Both the Lower Courts have decreed for the plaintiff. They find that Anund Chunder Ghose, in the year 1848, brought a claim before the Collector for registry of his name as 8 annas sharer of Busssoopoor, and that the Collector admitted his claim, notwithstanding the objections then made by the present defendants, whom the Collector then referred to the Civil Courts. They found that the defendants had allowed 12 years to pass since the Collector passed those orders, without bringing any suit to establish their title, and they appear to have considered from these facts that the defendant's present claim was barred by limitation.

From this decision this special appeal is preferred. We are of opinion that the decision is based on an incorrect application of the Law of Limitation. Neither party have pleaded limitation, nor could limitation be applied to the defendants. The question at issue between the parties is the title to 8 annas of the estate, and that turned upon the question whether Durponarain and Brindabun Roy were joint owners of Mouzah Bussoopoor, or whether Brindabun Roy was the sole owner of it. The whole *onus* of proving the title to which the plaintiff lays claim rests upon him. The decision of the Collector on the question of possession is not binding on the Civil Courts. He may have formed his own opinion on the question in order to determine whether he should enter the applicant Anund Chunder Ghose's name in the register. But that is not a final decision. It is quite open to question in this suit. Its correctness is doubtful when we find that the defendants have, notwithstanding that decision,

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ever since paid the Government revenue for the whole 16 annas of the estate into the Collectorate.

The decision of the Lower Court is reversed, and the case remanded in order that the proper issues as respects the plaintiff's title may be laid down and determined.

The 12th July 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Pre-emption.

Case No. 2502 of 1863.

Special Appeal from a decision passed by Mr. R. Abercrombie, Judge of Dacca, dated the 12th June 1863, *reversing a decision passed by Moulvie Ali Azim, Principal Sudder Ameen of Furreedpore, dated the 17th February* 1862.

Isur Chunder Shaha (Defendant) *Appellant,*

versus

Mirza Nisar Hossein and others (Plaintiffs) *Respondents.*

Mr. R. T. Allan and *Baboo Romesh Chunder Mitter* for Appellant.

Baboo Romanath Bose for Respondents.

To establish a claim of pre-emption, it is indispensable that all the necessary ceremonies should be performed.

Pundit, J.—The special respondent sued on the right of pre-emption. The first Court found that, though the ceremony of tulaba mosibut was duly performed by the plaintiff, he had not formally completed the ceremony of *Istekhad*; that though he had expressed his desire to purchase and offered money in the presence of witnesses, he had not, as required by the Mahomedan Law, called upon these persons to be the witnesses of his acts. As the claim of pre-emption is a right not much favored even by the Mahomedan lawyers, and so it is not unjust to plead technical objections to it by way of defence, the Lower Court dismissed the claim of the plaintiff. On the appeal of the plaintiff, the Lower Appellate Court held that what was proved to have been performed by the plaintiff, with regard to this second ceremony, was quite sufficient to meet the requirements of the Mahomedan Law.

Defendant has appealed against this decision in favor of the plaintiff.

As the conclusion of the first Court was right, and plaintiff has not performed the second ceremony of "affirmation by witnesses" as strictly as is required by the Mahomedan Law, we reverse the decision of the Lower Appellate Court, and, upholding the order of the first Court, dismiss the claim of the plaintiff and decree this appeal with costs.

Morgan, J.—It is clear that the whole of the necessary ceremonies have not been performed, (witnesses not having been duly invoked), and that there is, therefore, no right of pre-emption. Decree the appeal with costs.

The 12th July 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble F. A. Glover, *Judge.*

Lease—Hindoo Widow—Sale in execution.

Case No. 2833 of 1863.

Special Appeal from a decision passed by Mr. W. Fowle, Officiating Judge of Rungpore, dated the 4th August 1863, *reversing a decision of the Principal Sudder Ameen of that District, dated the 9th January* 1862.

Rajkishen Sircar and others (Defendants) *Appellants,*

versus

Chowdhry Jaheeroorul Huq and others (Plaintiffs) *Respondents.*

Baboos Oprokash Chunder Mookerjee and *Onokool Chunder Mookerjee* for Appellants.

Mr. G. C. Paul and *Baboo Kally Kishen Sen* for Respondents.

A purchaser at a sale, in execution of the rights and interests of a Hindoo widow, is entitled to question the validity of leases made by the widow.

Norman, C. J.—This was a suit brought by the purchaser of a certain talook in execution of a decree for arrears of rent under Act VIII of 1838, to cancel certain leases granted by the former proprietrix of the estate, Ruttun Monee Dassee, to special appellants Nos. 1 and 2, on the ground that she, being a Hindoo widow, had no power to grant leases of this description. The defence was that special respondent only purchased the rights of Ruttunmonee, and could not therefore cancel pottahs regularly given by her.

The Court of first instance held that the plaintiff (special respondent) could not contest the pottahs, but this decision was reversed on appeal before the Judge.

It is urged before us that the special respondents not being the reversioners, but only the

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purchasers at an auction sale of Ruttun Monee's rights and interests, had no power to contest the pottahs granted by that lady.

A Hindoo widow fully represents the estate as heir in possession for the time being, though she has only a limited power of alienation. *See* Doe dem. Muddoosoodun Dass *vs.* Mohendrolall Khan, 2 Boulnois, pages 40-42. Doe dem. Goluckmoney Dabee *vs.* Degumber Dey, 2 Boulnois, page 198.

The plaintiffs as purchasers in execution of a decree for rent obtained against Ruttunmonee under Act VIII of 1838, acquired the whole tenure or territorial rights which were formerly vested in Ruttunmonee's husband, and which she, for the purposes of that suit, fully represented, and having acquired the ownership in the estate by the sale in execution, was fully entitled to question the validity of all encumbrances created by any prior owner, either as being created in excess of her powers as a Hindoo widow, or as invalid for any other reason.

We think, therefore, that, as Ruttunmonee is not shown to have had any power to grant the leases complained of, these leases have been rightly set aside, and the appeal is accordingly dismissed with costs.

The 13th July 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Hindoo Law—Rights of father (in son's self-acquired property).

Case No. 2872 of 1863.

Special Appeal from a decision passed by Mr. A. A. Swinton, Judge of Tipperah, dated the 17th August 1863, *modifying a decision of Baboo Dwarkanath Roy, Principal Sudder Ameen of that District, dated the 31st December* 1859.

Anund Mohun Paul Chowdhry and others (Defendants) *Appellants*,

versus

Sreemutty Shamasoondery and another (Plaintiffs) *Respondents*.

Mr. G. C. Paul and *Baboos Hem Chunder Banerjee* and *Romesh Chunder Mitter* for Appellants.

Baboos Kishen Kishore Ghose, Dwarkanath Mitter, Kali Mohun Doss, and *Chunder Madhub Ghose* for Respondents.

The doctrine of Hindoo Law that a father takes a share in his son's self-acquired property, applies only to cases of families in joint estate, but not where separation in estate has taken place.

Norman, C. J.—Two objections were taken before us in this appeal on behalf of the appellants, *first*, that the Judge had admitted Kaleenath as representative of the deceased Seebram, under Section 102, without having tried or in fact taken any evidence as to the validity of the will, by which it was alleged that Seebram devised the property now in suit to him and his other uncles in trust for his widow Shamasoondery, though, by a petition filed in the suit, the will was alleged by the now appellant to be a forgery.

On examination of the nuthee, we were unable to find that any evidence had been taken, or any order recorded on the point, though from the judgment we should have been led to infer that an enquiry into the genuineness of the will had taken place. Instead of remanding the case for enquiry, we examined a witness, Gosenauth Sen, a Koberaj, who was present in Court, whose testimony satisfied us that the will was sufficiently proved for the purposes of this appeal; though, of course, as the enquiry was in the absence of the daughter or other heirs of the deceased, we do not intend, by our finding, to hold the will proved as against them should they wish to question it.

The *second* point was that the plaintiff's grandfather, Nundokishore, having died in the lifetime of his father, the property in suit, though self-acquired by him, belonged to himself and his father jointly. This point had not been taken in either the Lower Court or the Appellate Court, when the case was before remanded. We must, therefore, take the facts to be such as would constitute an answer to the contention, if it is capable of an answer. The appellant relied on a case, 2 Macnaghten's Hindoo Law, p. 163, cited in Shamachurn's Vyavastha Durpana, 389, as showing that a Hindoo father takes a share in the self-acquired property of his son, though not gained by means of the funds belonging to the joint estate, but solely by his own exertions. We think, however, that the passage applies only to the case of acquisitions by members of Hindoo families who remain joint in estate, and does not apply to the present case, in which we must assume that separation in estate has taken place. We dismiss the appeal with costs.

N. B.—On cross-appeal, Baboo Kissen Kissore objected that the Judge had made a mistake in not awarding to respondent Kanees admitted not to be included in appellant's purchase. If that is so, the application to correct the mistake may be made to the Judge.

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The 13th July 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Sale Law—Section 21 Act I of 1845.

Case No. 2639 of 1863.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 16th June 1863, affirming a decision of the Sudder Ameen of that District, dated the 18th February 1863.

Bissonath Surma Bhuttacharjee (Plaintiff) *Appellant,*

versus

Mr. Moran and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Bhuggobutty Churn Ghose* for Appellant.

Baboo Sreenath Doss for Respondents.

Section 21 Act I of 1845 held inapplicable to a suit brought, not to oust the certified purchaser on the ground that the purchase was made on behalf of another person, not the certified purchaser, but to make void a pottah granted by his mother.

Morgan, J.—The Lower Courts have applied the 21st Section of the (now repealed) Act I of 1845 improperly to this case. This is not a suit brought to oust the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser. It is a suit brought by the plaintiff to make void a pottah granted by his mother. She, with other persons, was a purchaser of the estate at a sale for arrears of revenue, and the certificate was taken in her name. The plaintiff alleges that the purchase was made by her on his behalf and out of his funds, he being then a minor. The mother, who is a party to the suit, does not dispute this. She puts in no answer and files no written statement. The question which really arises in this suit is not between the mother and the son, but between the defendant claiming under the pottah, and the plaintiff who alleges that no valid pottah was granted. The Section is inapplicable to such a case.

We must remand the case to the Court of first instance in order that that Court may determine the question which really arises, namely, whether the plaintiff, by reason of some want of authority in his mother or for any other cause, is entitled to set aside the putnee which the defendant claims to have.

The 15th July 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Chakeran Land.

Case No. 3310 of 1863.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 25th of August 1863, reversing a decision of the Moonsiff of that District, dated the 30th July 1862.

The Collector of East Burdwan, on behalf of Government (Plaintiff) *Appellant,*

versus

Ram Nidhee Koberaj and others (Defendants) *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

Baboo Nobo Kishen Mookerjee for Respondents.

Where a party seeking a declaration of title to certain lands as chakeran, rested his claim on the Register of Chakeran Lands prepared in 1836,—Held that it was incumbent on him to show how the lands in question were omitted from the earlier Registers of 1810 and 1813.

Loch, J.—This is a suit brought by Government for a declaration of title to beegah 1-11 as chakeran. The defendants claim it as their rent-free tenure, and state that in 1266 the Ghatwal forcibly appropriated the paddy, on which they brought an action to recover the value of the same and obtained a decree which was affirmed in appeal. Further, that the land in question, with other lands, comprising 11 beegahs, had been the subject of an Act IV case in which their possession through their tenants, was upheld against the Ghatwal.

The first Court gave a decree for the plaintiff; but this order was reversed in appeal, the Principal Sudder Ameen holding that the plaintiff had failed to prove his title, and that the register of chakeran lands of 1836, which was relied on as evidence, was not any proof of that title.

In special appeal it is urged that the Lower Court should have been guided by the decision of this Court in the case of Joykishen Mookerjee dated 17th April 1861, in which registers of this kind were accepted as evidence, and the same view has been taken of them by the Privy Council in their recent decision in the same case. Further, both parties admit the correctness of the register, and defendants quote the register and rely on it; that the registers are public documents, and, as such, receivable as evidence under Act II of 1855.

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It is not shewn us in what manner the respondents have relied on the register of 1836. They may refer to it, but that is neither an assent to its correctness nor a reliance on its statements; and, considering how recently that document has been prepared, we think that, where a party, seeking declaration of title or possession, rests his claim on that register, he should show how it was that the lands were omitted from the earlier registers of 1810 and 1813. We see no reason to interfere with the judgment of the Lower Court on the grounds urged in special appeal.

We think it necessary to point out to the Lower Court that, where a party brings an action of this kind for declaration of title it is on the supposition that he is in possession; that, if possession is denied, the plaintiff must prove possession; and that if he be not in possession, he is entitled to no declaration of title. We dismiss the appeal with costs.

The 15th July 1864.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Breach of contract—Assessment of damages.

Case No. 8 of 1864.

Regular Appeal from a decision of the Principal Sudder Ameen of Nuddea, dated the 5th October 1863.

Sreegopal Pal Chowdhry and others (Plaintiffs) *Appellants,*

versus

The Bengal Indigo Co. (Defendants) *Respondents.*

Messrs. R. V. Doyne and *G. C. Paul* for Appellants.

Mr. R. T. Allan for Respondents.

Where the parties to a contract assess by agreement the amount of damages payable in case of a breach of the contract, it is the duty of the Court to enforce the terms of the contract which they have made.

Morgan, J.—The kubooleut executed by the defendents, (who are the respondents here) contains the following provisions:—"That at the end of every year I will deliver to your serista the annual collection papers, jumma-wasil-bakee, together with lowazima, goozushta, pyeshta, agreeing with the 'khoot jumma,' if possible, with a larger scale, and take a receipt for the same bearing your seal and signature. That if I do not deliver the papers in question within the month of Kartick of the year following that which has expired, then I will pay a separate sum in the shape of nuzzerana at the rate of 50 rupees for each village and year in respect of which the papers have not been delivered, as compensation for the inconvenience occasioned owing to the non-delivery of papers. That the abovenamed gentleman (Captain Crawford) is my surety (malzaminee) for this also. That if I do not deliver the said papers, you will be competent to realize the said amount, by bringing actions in the Courts of Justice from my and my surety's persons and properties. That we will not be able to object or complain of the same."

The appellants here were the plaintiffs in the suit which was brought to recover damages for a breach of this stipulation, and the decision of the Court below was in the defendant's favor, on the ground that, although the breach alleged (which is the non-delivery of the papers for the two years 1266 and 1267) had been proved, the provision concerning the payment of the 50 rupees was to be continued, not as giving a right to damages fixed at that amount, but as being in the nature of a penalty to enforce the delivery of the papers; and the defendant, having proved that he had, before the institution of the suit, offered to deliver the papers, and was still ready and willing to deliver them to the plaintiff, the Principal Sudder Ameen considered that the suit must be dismissed.

From this decree there are cross-appeals here. The defendants appealed on the ground, *first*, that the document was insufficiently stamped; and, *next*, that the evidence shewed no breach of this stipulation.

The kubooleut bears a sufficient stamp in proportion to the value or amount of the rent received, and no additional stamp was required by reason of the above stipulation respecting damages.

As to the second objection, that no breach was proved, we concur with the Principal Sudder Ameen in his view of the evidence. Some evidence was given to show that, in respect of the year 1266, one of the two years during which the defendants failed to deliver these papers (which were the two last years of the ijarah), the accounts of the year had been duly tendered according to the terms of the stipulation. We discredit that evidence, and we find, as the result of the whole, what the Principal Sudder Ameen has already found, that there has been a substantial breach of the agreement. It is, we think, established that the papers of those years were not tendered or delivered until long after the termination of these years; and, as the case stands, there has been proved a

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substantial and entire breach of the stipulation, and the question of damages, which is the chief question in this appeal as it was in the Lower Court, arises on the appellant's ground of appeal.

The Court below held that the terms used by the parties, imported, not that they assessed the damages for themselves, but that a penalty was provided. In our opinion that view of the matter is incorrect. The rule we are to apply to the construction of this stipulation is this,—that we are to endeavour to ascertain the intention of the parties from the terms which they themselves have used. Applying this rule, it seems to us that they have plainly expressed their intention to fix the damages in case of breach of the agreement. The agreement relates to matters respecting which it is very difficult or impossible to lay down any rule for assessing the proper damages in case of breach. This is not like the case of an agreement including several different matters of various degrees of importance, some or all of which are easily estimated in case of breach by a certain money payment. The breaches of the provisions in this agreement are all of uncertain value, and we should be at a loss to fix or ascertain the precise amount of the damage which the plaintiff would suffer by the defendant's omission to deliver the papers within due time after any given year. The parties propably having in view this difficulty, have, it seems to us, distinctly provided that a certain sum shall be payable to compensate for the non-delivery of the papers.

The case which has arisen is one of substantial breach in respect of of the last two years of the ijarah. There is no rule of law which prohibits persons from assessing by agreement the amount of damages to become payable in case of a breach of contract. It seems to us that in this case the parties have plainly done this, and that it is the duty of the Court to enforce the terms of the contract which they have made.

We shall reverse the decree of the Principal Sudder Ameen, and give the plaintiff a decree for the amount agreed upon in the kuboolent.

The appeal will be decreed with costs.

The 15th July 1864.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Boundary dispute — Title — Power of zemindars to alter boundaries of permanently settled estates.

Cases Nos. 336 to 338 of 1863.

Regular Appeals from a decision passed by Mr. R. H. Russell, Judge of Midnapore, dated the 6th April 1863.

Ramchunder Banerjee (Defendant) *Appellant,*

versus

Muddunmohun Tewaree (Plaintiff) *Respondent.*

Mr. R. T. Allan and *Baboos Kishen Kishore Ghose* and *Mohesh Chunder Chowdry* for Appellant.

Baboos Unnoda Pershad Banerjee and *Dwarkanauth Mitter* for Respondent.

Suit laid at rupees 5,920-2-4.

When litigants claim as strangers, and the question resolves itself into a boundary dispute, the title of the plaintiff is not, except under very peculiar circumstances, open to attack. But where the plaintiff sues for possession of property in the defendant's hands, not as forming part of another estate, but as having right thereto under a superior title, then the defendant has a right to call the plaintiff's title in question.

Zemindars have no authority, without the sanction of Government, to alter the boundaries of their permanently settled estates, and to transfer villages from one zemindaree to another. Such an arrangement is of no binding effect, except between the parties who have made it.

Loch, J.—The plaintiff is the heir of the late Hureepershad Tewaree, adopted by his wife Soondur Koomaree, under a permission left by her husband. These suits are brought to recover possession with mesne profits of certain villages of Lot Gungpore, which the defendant, as purchaser of the rights and interests of Soondur Koomaree in Lot Gungapershad, has appropriated.

The facts admitted by both parties are those. There are two estates paying revenue to Government in the Collector's Rent Roll: one Lot Gungpore. No. 289 ; the other, Lot Gungapershad, No. 290. The proprietors of these estates were two brothers, Gudadhur and Hureepershad, each holding a moiety of either Lot and making collections in common. On the death of Gudadhur, his widow, Chumpa Koomaree, succeeded, and on the death of Hureepershad, his widow, Soondur Koomaree, took poseession and adopted a son, the plaintiff. Lot Gungpore comprises 49 villages, and Lot Gungapershad 37 villages.

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For the purpose of facility of collecting their rents and to prevent disputes, the two widows made the following private arrangement. They divided the two zemindaree into 17 putnees, each putnee comprising villages taken indiscriminately from one or other of the zemindarees, and of these putnees, Chumpa Koomaree took nine as her share, and Soondur Koomaree, the other eight. They held separate possessson of their respective shares thus formed, and made collections separately; but this arrangement was never sanctioned by the Revenue Authorities, and the two Lots are borne in the Collector's towjee to this day, as they were originally created at the Permanent Settlement. A regular butwara, on the application of Champa Koomaree, was subsequently commenced; but after the measurements had been made, further proceedings were quashed by the Revenue Authorities.

In Jeyt 1261, the rights and interests of Soondur Koomaree in Lot 290, Gungapershad, were sold in execution of a decree, and purchased by the defendant, appellant; and under his purchase he took possession of the whole villages of Lot Gungapershad, which fell within the share of Soondur Koomaree under the private arrangement, as also of the villages of Lot Gungpore, which were in her possession under the same arrangement. And the object of the present suit is to recover possession of these villages of Gungpore, on the allegation that, as defendants purchased the rights and interests of Soondur Koomaree in Lot Gungapershad only, he is not entitled to have possession of the villages of Gundpore.

The objections raised to the claim are: 1*st*, that plaintiff's adoption is not valid, and, therefore, he has no right to sue; 2*nd*, that as the private partition is binding on the parties who made it and their representatives, if plaintiff wishes to recover possession of the villages of Mouzah Gungpore, he is bound to bring an action to set aside that private partition, making Chumpa Koomaree and others, as well as present defendant, parties to the suit.

We think that the plaintiff's title, *viz.* the validity of his adoption, cannot be questioned by the defendant in this suit. He comes into Court claiming certain villages as part of Lot Gungpore, an estate with which defendant has nothing to do. Had he brought his suit for the possession of Lot Gungapershad, then the defendant, as purchaser of the rights and interests of his adoptive mother, might fairly have put plaintiff to proof of the title under which he brought his action. But the present suit is nothing but a boundary dispute. Plaintiff in effect says:—I am a proprietor of Lot Gungpore. The villages in defendant's possession, which I claim, are villages of Gungpore. Defendant purchased the rights of Soondur Koomaree in Gungapershad, and that purchase gives him no right to the villages in Gungpore. The defendant's allegation is that, though the villages were originally in Gungpore, they were by private partition transferred to Soonder Koomaree, whose rights and interests I have purchased; and until that private partition be set aside, plaintiff has no right to claim the villages I hold under it. Plaintiff therefore claims the villages as appertaining to Gungpore, defendant to Gungapersad. In such a case, we do not think, that the validity of plaintiff's adoption can be questioned, for, in this suit, defendant cannot attack the plaintiff's right to Gungpore, and it is as proprietor of Gungpore he brings this claim The proper rule for determining the point, whether a plaintiff's title can be attacked, appears to be this, that when the litigants claim as strangers, and the question resolves itself into a boundary dispute, the title of the plaintiff is not, except under very peculiar circumstances, which certainly do not arise in this case, open to attack. But where plaintiff sues for possession of property in the defendant's hands, not as forming part of another estate, but as having right thereto under a superior title, then the defendant has a right to call plaintiff's title in question. For supposing, in the present case, defendant were to succeed in disproving the adoption, yet this would not prevent the action going on, for plaintiff would still be *de facto* proprietor of Gungpore, and so long as he holds possession as such, he would still be entitled to bring actions for the recovery of lands belonging to that estate which had been illegally alienated.

With regard to the second point in the case, it is unnecessary for us to mention specially any of the documentary evidences produced by the defendant, for its object was to prove the fact of a private partition, a fact fully admitted by the plaintiff. We must, however, refer to one document brought to our notice by the plaintiff, *viz.* a decision of the Civil Court, dated 2nd December 1859, as shewing what the defendant considered as falling within his purchase. He brought this action against Soondur Koomaree to recover possession of two villages, Jote Bashon and Muddunbati in Lot Gungapershad. He claimed these under the butwara made by order of the Revenue Authorities, which

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butwara has been quashed, and his pleader states that there was nothing inconsistent in this claim, for these villages were comprised in one of the putnees which fell to Soonder Koomaree under the private partition. But in the same putnee was a third village, Annundagharee, which properly belonged to Gungpore, and to this the defendant laid no claim. He claimed the other two villages, it is said, as being included in his auction-purchase; why did he not claim the third, if it formed part of one of the putnees assigned to Soondur Koomaree? and he had, as he alleges, purchased all her rights and interests. This judgment, however, is not material to the present case. What we have to ascertain is the extent of the defendant's purchase in execution, and see whether he is entitled to all the benefits of the private partition admitted by both parties to have been made by Chumpa Koomaree and Soondur Koomaree.

On the first *point*, we think, there can be no question. The defendants purchased the rights and interests of Soondur Koomaree in Lot Gungapershad, No. 290, as it stood in the Collector's register. He did not purchase any of her rights and interests in Gungpore, and, therefore, under the sale, he is not entitled to hold any of the villages of that Lot. Then, as to the *second* point, as the private partition between the ladies was never sanctioned by the Revenue Authorities, we can look upon it only as an arrangement made by the parties for mutual convenience to enable them to collect rents without disputes. Zemindars have no authority, without the sanction of Government, to alter the boundaries of their permanently settled estates, and to transfer villages from one zemindaree to another. It is against the policy of the Revenue Laws to allow of such a practice, for, if permitted, it would lead to endless confusion and complications, and, therefore, any arrangement such as the one before us, is of no binding effect, except between the parties who have made it. Had the defendant purchased the rights and interests of Soondur Koomaree in both zemindaries, he might have elected either to abide by the present arrangement, or to have sought recovery of her moiety in both estates; but as he has purchased her rights in Lot Gungapershad only, he has clearly no right to any portion of the lands of Gungpore; and he must either content himself with the whole villages of Gungapershad held by Soondur Koomaree under the private partition, or, if so advised, he may give up a moiety of these, and sue to recover possession of a moiety of other villages of that Lot now in the possession of Chumpa Koomaree under that same arrangement.

But it is urged that the private partition cannot be disturbed by the plaintiff, sanctioned, as it has been, by the decision of the late Sudder Court on 27th June 1857, and further that as plaintiff is entitled, under any circumstances, only to a moiety of Gungpore, he cannot sue for the possession of the whole villages. Plaintiff, however, does not seek to disturb the private partition. He in fact rests his claim upon it. He claims the whole villages, because he says, in effect, there is an arrangement between me and Chumpa Koomaree, by which she has possession of the whole of certain villages in Gungpore, to a moiety of which I am legally entitled, and she has given me up instead her half share in the villages of Gungpore now in suit; and so long as this arrangement continues, my claim to the whole of each village, partly in my own right, and partly as representing her, cannot be disputed. We think this to be the right view of the case, and we affirm the decisions of the Lower Court, and dismiss the appeals with costs.

The 15th July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Remand—Sections 351 and 354 Act VIII of 1859.

Case No. 2806 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 10th July 1863, modifying a decision of the Moonsiff of that District, dated the 21st March 1863.

Ram Chunder Goopta (Plaintiff) *Appellant,*

versus

Bhagessur Surma and others (Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Khettur Mohun Mookerjee for Respondents.

Section 351 Act VIII of 1859 is meant for those cases in which a Lower Court has disposed of a case on a purely preliminary point. Where abundant evidence has been taken, if the Lower Appellate Court thinks any further evidence or enquiry necessary, its proper course is, not to get rid of the case by remanding it to the Lower Court, but to frame an issue and to refer the same to the Lower Court for trial under Section 354.

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Seton-Karr, J.—The *first* point argued is that the Lower Appellate Court has been led away by placing too much reliance on the decree of May 1856; but this point is of no weight, inasmuch as there was other evidence in the case on which the Court relied.

The *next* point is that the Court should not have remanded the case under Section 351 of the Civil Code, but should have retained it on its own file under Section 354.

After hearing the pleader for the respondents, we are opinion that there is weight in this argument. Section 351 is meant for those cases in which a Lower Court has disposed of a case on a purely preliminary point, without going into any of the merits, so as to exclude evidence of facts essential to the rights of the parties.

But, in the suit before us, abundant evidence had been taken, and if the Lower Appellate Court thought that any further evidence was necessary, or that a further enquiry was essential, the proper course was for the Principal Sudder Ameen, not to get rid of the case by returning it to the Moonsiff, but to frame an issue, and to refer the same to the Lower Court for trial, strictly in accordance with the provisions of Section 354 These forms of procedure are not mere technicalities. They are substantial and essential parts of the trial of a case, and the object of such a Section is clear. It is intended that the Appellate Court, which requires further evidence, shall retain the case on its own file, shall keep an eye on, and feel interest in, the same, instead of losing sight of the matter, and thus, in all probability, causing additional delay in the ultimate settlement of the litigation.

We reverse that part of the order of the Principal Sudder Ameen, which directs that the case shall be remanded to the Moonsiff, and direct that he re-call the case to his own file, framing an issue for the Lower Court and keeping strictly within the provisions of Section 354.

The 15th July 1864.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Plea of Limitation — Registers of Chakeran Lands.

Case No. 3283 of 1863.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 31st August 1863, reversing a decision of the Moonsiff of that District, dated the 29th August 1862.

The Collector of East Burdwan (Defendant) *Appellant,*

versus

Sheikh Imdad Ali and others (Plaintiffs and Defendants) *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

Baboo Debendro Narain Bose and *Annund Gopal Paulit* for Respondents.

The allegation of the defendant that the tanks in dispute had been in his possession for more than 30 years, in reply to the plaintiff's claim to recover possession, was held clearly to raise the plea of limitation, though the actual words that the suit was barred by limitation were not used

The Registers of Chakeran Lands are public records supposed to contain a correct list of the chakeran lands in existence at the time of the Decennial Settlement.

Loch, J.—In this case the plaintiff seeks to recover possession of two tanks which the defendant holds possession of on the allegation that they form part of his chowkeedary chakeran lands. The Government has been made a party to the suit, and pleads that for the last 30 years these tanks have been in the undisputed possession of the defendant, chowkeedar, and his predecessor, as chakeran. The Lower Courts have given the plaintiff a decree, holding that no proof of the lands being chakeran has been adduced; that these tanks are not entered in the earlier registers of chakeran lands of 1810 and 1220 (1813), though one is mentioned in the subsequent register of 1836; that the registers themselves are no proof; and that, as limitation has not been distinctly pleaded against the claim, the mere allegation of long possession for 30 years, by way of recital, is not sufficient to raise that plea.

The pleas urged in special appeal are: 1*st*, that the Lower Courts admit the continued long possession of the defendant, and therefore the claim is barred by limitation; 2*nd*, the registers of chakeran lands, prepared by authority and kept in the Magistrate's office, are public records, and, as such, are evidence under Act II of 1855; 3*rd*, the Principal Sudder Ameen was wrong in throwing the burden of proof on the defendant, and the decision rests, not on the evidence, but on conjecture.

In this case we think the allegation of the Collector, that the tanks in question had been in possession of the defendant as chakeran for more than 30 years, in reply to the plaintiff's claim to recover possession, clearly raised, and was intended to raise, the plea of limitation, though the actual words that

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the suit was barred by limitation, were not used. It is stated that the present incumbent has had possession of these lands as chakeran for at least 17 years, and that his predecessors held before him. As, however, no issue has been raised on this point, we must remand the case for the trial of the plea of limitation.

We think it necessary to point out to the Lower Court that the registers of chakeran lands are public records, supposed to contain a correct list of the chakeran lands in existence at the time of the Decennial Settlement. These lists, it is true, were prepared some time after that settlement, but they are not on that account to be rejected as untrustworthy, for they were prepared with the knowledge of the zemindars, who had full opportunity of pointing out any misstatements that might have been made in them; and they, particularly the earlier ones of 1810 and 1220, are appealed to generally by all parties in disputes regarding chakeran lands as conclusive against one or other of the disputants, as the land in question is or is not entered in the register.

The 18th July 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Sale in Execution — Subsequent incumbrances by original proprietor.

Case No. 2867 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 13th July 1863, affirming a decision passed by the Sudder Ameen of that District, dated the 10th April 1863.

Baboo Bhugoban Chunder Doss (Plaintiff) *Appellant,*

versus

Lalla Thakoor Pershad and others (Defendants) *Respondents.*

Baboo Anund Chunder Ghosal for Appellant.

Baboo Poorno Chunder Mookerjee for Respondents.

The purchaser at a sale in execution of the rights of the original proprietor in a certain property pledged for the debt for which the decree executed was obtained, cannot be held bound by any incumbrance created by the proprietor subsequent to the plege.

Pundit, J.—Special appellant having in an execution sale bought the rights of the original proprietor in a certain property pledged for the debt for which the decree executed was obtained, cannot be held bound by any incumbrance created by the proprietor subsequent to the above pledge. The Lower Courts hold that, because the proprietor had executed another pledge prior to the one under which special appellant purchased, the second deed by the said proprietor is invalid, and so he *could* create incumbrances upon his property subsequent to the said invalid deed, and the special appellant, the purchaser of the rights of the said proprietor, is bound to respect these incumbrances. The rights under the first pledge are not affected by any order in this case; and because of the first pledge, the execution of the second does not become invalid, although the purchaser under the second pledge must be bound to respect the first pledge, and cannot object to the holder of it demanding his money against the property pledged quite irrespective of the second pledge. Those rights, however, are not at present under consideration. The present dispute is merely between the plaintiff in this case, and the holders of zur-i-peshgees whose titles were created *after* the second pledge. In this view of the case we decree the appeal and the plaint of the special appellant, and reverse the orders of both the Lower Courts.

The 18th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Execution—Re-issue of process—Irregularity.

Case No. 3363 of 1863.

Special Appeal from a decision passed by the Officiating Judge of Behar, dated the 24th of July 1863, affirming a decision of the Principal Sudder Ameen of that District, dated the 21st May 1857.

Bishen Dyal Singh and others (Plaintiffs) *Appellants,*

versus

Sreemutty Khudeomun and others (Defendants) *Respondents.*

Mr. R. E. Twidale for Appellants.

Mr. C. Gregory and *Baboo Unnoda Pershad Banerjee* for Respondents.

After the striking off of an execution case, the omission to re-issue the processes required by law, on the admission of a third party as decree-holder, is not a material irregularity in the case.

Bayley, J.—In this case plaintiff sued on a deed of sale dated the 9th February 1854, on the 23rd February 1854, to recover pos-

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session of land, and to set aside on account of irregularity a sale made in execution of decree on the 29th November 1844, by which sale that land had passed to other parties. The prominent facts are these:—

One Jungul Singh held a decree against Munoruth Sing. Under it Mungul Singh attached the property in suit. Before it was brought to sale, one Mukhun Lal, who alleged that he had a decree against Jungul Singh, made an application to be substituted as decree-holder for Jungul Singh, and thus to have the benefit of the sale in execution. This application, it is stated, was admitted by an order on the back of the petition.

The first Court held that the plaintiff's alleged deed of sale was collusive and fraudulent, and of rights that did not exist, and that, therefore, plaintiff's suit to set aside the sale as irregular must be dismissed. An appeal was preferred from that decision. The Mutinies then occurred, and in them the original records were destroyed before the appeal was decided. By an order of this Court dated 10th December 1862, the Zillah Courts were directed to take secondary evidence of the existence of the decree.

The Judge held that the decision below was not to be questioned, and that it need not be considered, and that there was neither fraud nor material irregularity. The plaintiff's appeal was accordingly dismissed by the Judge. Plaintiff appeals specially.

The grounds of special appeal in the petition are that the Judge has misconstrued the plaint, which, as well as the decree of the first Court, set forth the plea, which was proved by them, of irregularity, inasmuch as after Jungul Singh struck off his execution of decree case, Mukhun Lall could not be *in loco* of Jungul Singh as decree-holder, nor could he be so looked upon without re-issuing all the processes required by law, and that they had not been issued by him.

In the first place we remark that the pleas were taken, and that the judgment of the first Court did deal with these three specific issues. But its finding being that there was no such kubala of 9th February 1844 as that on which plaintiff came into Court, the sale, whether regular or otherwise, could not be set aside on plaintiff's suit. The first Court also found as a fact that the judgment-debtor's property had been sold in execution more than nine years, and there had been till now no question by any one as to their having passed by the execution sale, and that there was every presumption that the plaintiff's alleged deed of sale purported to convey rights which, having been duly sold in execution, no longer existed.

The Judge, as it appears and as we have before stated, concurred in this view generally, and specifically held that there was no such material irregularity as to require the reversal of the sale. Referring to the tenor of the decision of the Privy Council in the case of Mohesnarain Singh dated 9th December 1862, we do not think that the omission to re-issue the processes after the striking off of the execution case of Jungul Singh, was a material irregularity in the case, as Mukhun Lall had really taken his place under orders of a competent Court *quoad* that decree, and when that decree was executed nine years before this claim was heard of, the necessary processes are found to have been taken out. We therefore see no validity in this objection.

It is pressed on us at the hearing that the remand order requiring the Judge to take evidence and otherwise dispose of the case required him to re-try it on the merits *de novo*, and that he did not do so. But this is not in the petition of special appeal.

The third point relied upon in support of the plea is that the Judge did not sufficiently consider all the grounds taken by the Principal Sudder Ameen. We think, on the whole, that he did, and, looking to all the facts of the case, we see no reason to interfere, and reject this special appeal with costs.

The 18th July 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Jurisdiction—Section 14 Act VIII of 1859.

Case No. 39 of 1864.

Regular Appeal from a decision passed by Baboo Tarakant Biddyasagur, Principal Sudder Ameen of Jessore, dated the 7th December 1863.

Sreenath Dutt Chowdhry and others (Plaintiffs) *Appellants,*

versus

Doorga Doss Roy Chowdhry (Defendant) *Respondent.*

Baboos Dwarkanath Mitter and *Unookool Chunder Mookerjee* for Appellants.

Suit laid at rupees 14,758-8.

The adjudication contemplated by Section 14 Act VIII of 1859 is any adjudication which is effectual till reversed by a competent Court. Consequently, when a

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summary adjudication of a Revenue officer charged with the settlement of boundaries declares certain land to belong to a certain district, the land is *de facto* placed in the jurisdiction of that district; and while it so remains, all actions regarding it must be brought in the Courts of that jurisdiction.

Campbell, J.—PLAINTIFF sued in Zillah Jessore for certain lands on the boundary between Zillahs Jessore and Backergunge. Those lands have been adjudged in the Revenue Courts of the officers charged with the settlement of boundaries, to belong to the defendant's estate in Zillah Backergunge. On that ground the defendants demur to the jurisdiction of the Jessore Courts, and on that ground the Principal Sudder Ameen has directed the return of the plaint.

We think that the Principal Sudder Ameen was right under the provisions of Section 14 Act VIII of 1859. That Section provides that, "if the land have been adjudged by competent authority to belong to an estate, village, or known division situated in another jurisdiction, the suit shall not be entertained." It is contended that these words do not apply to a summary adjudication, not final, and liable to be reversed by regular suit. But it seems to us that, if such were the construction, the words would be mere surplusage, being nothing more than a declaration that a matter which has been already adjudicated by a competent Court shall not again be brought into question by a Court of equal authority—a declaration which would be wholly unnecessary and uncalled for. We think, then, that the adjudication contemplated by the words of Section 14 must be any adjudication which is effectual till reversed by a competent Court; that by the summary adjudication, the land in dispute is *de facto* for the time being placed in the Backergunge jurisdiction; and that while it so remains, all actions regarding it must be brought in the Courts of that jurisdiction. This principle has already been set forth in the decision of this Court of 13th April 1863, quoted by the Principal Sudder Ameen. As there observed, in the event that the decision of the Court now having jurisdiction should decree the land in dispute no longer to belong to the estate, village, or known division in that jurisdiction, but to an estate, village, or known division in the other jurisdiction, then, from the date of the execution thereof, the land will pass to the other estate, village, or division, and the jurisdiction for all future suits will also pass.

We dismiss the appeal with costs.

The 19th July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Remand.

Case No. 2956 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 15th August 1863, reversing a decision of the Moonsiff of that District, dated the 11th February 1863.

Luchmun Lall Doobey Gowally (Defendant), *Appellant,*

versus

Hursohoy Lall (Plaintiff) *Respondent.*

Mr. C. Gregory and *Baboos Poorno Chunder Mookerjee* and *Kishen Succa Mookerjee* for Appellant.

Baboo Kadernath Chatterjee for Respondent.

Where the first Court dismissed a suit on the ground of limitation, and the Lower Appellate Court reversed that order and remanded the case to the first Court for trial on its merits,—HELD that, if there was sufficient evidence to enable the Appellate Court to dispose of the case on its merits, that Court should have tried the case as prescribed by Section 353 Act VIII of 1859; but that, if further evidence were required, the Court should have followed the rule prescribed in Section 354 and following.

Loch, J.—THE first Court in this case threw out the suit on the ground of limitation. The Principal Sudder Ameen reversed that order and remanded the case to the first Court for trial on its merits This order is contrary to the rule laid down in Sections 353, 354, and following Sections of Act VIII of 1859, for it does not appear that there was not sufficient evidence on the record to admit of the case being disposed of on its merits by the Appellate Court; nor does the Principal Sudder Ameen send back the case to have the further evidence taken; but, having decided the preliminary point, he is glad to get rid of the case from his file and passes an illegal order. If evidence had been taken sufficient to enable the Appellate Court to dispose of the case on its merits, it should try the case as prescribed by Section 353; if further evidence were required, the Court should follow the rule prescribed in Section 354 and following. The only ground for a remand such as has been made in this case, is when there is no evidence recorded, and the first Court have disposed of the case on a preliminary point. We reverse the order of remand, and direct the Principal Sudder Ameen to restore this case to his own file; and if there be sufficient evidence to enable him to dispose of the case on the merits, he will dispose of it without

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delay: if he require further evidence, he will proceed as the law directs. This appeal is decreed with costs.

The 19th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Mesne Profits—Liability of Heirs.

Case No. 3432 of 1863.

Special Appeal from a decision passed by Mr. W. T. Tucker, Officiating Additional Judge of Behar, dated the 11th September 1863, affirming a decision of Baboo Tarakant Biddyasagur Bhutlacharjee, Principal Sudder Ameen of that District, dated the 27th January 1863.

Shookdun Pattuck and others (Plaintiffs) *Appellants,*

versus

Shungur Bharuthee and others (Defendants) *Respondents.*

Baboos Chunder Madhub Ghose and *Kalee Kissen Sein* for Appellants.

Mr. C. Gregory and *Baboo Kissen Succa Mookerjee* for Respondents.

The heirs of a lessee were held liable for the mesne profits of an estate which he held on an invalid title.

Jackson, J.—This was a suit for mesne profits of a mokurruree tenure brought against the proprietor and the heirs of a lessee, Chadee Loll, who had kept the plaintiff out of possession of his mokurruree tenure until a decree for it was passed in the Civil Courts.

Both the Lower Courts have exempted the heirs of the lessee from all liability. It is now urged that they are liable to the extent of the profits which Chadee Loll received from the estate, which he held on an invalid title. We think there can be no doubt that the lessee, Chadee Loll, is bound to reimburse to the plaintiff all the profits he received from the estate, *i. e.* all sums collected by him beyond what he himself paid as rent. It has been found and decreed in a Civil suit that he had no title to that money and that the plaintiff was entitled to it.

The Lower Court's decision is reversed and plaintiff's claim for mesne profits decreed against the heirs of Chadee Loll, to the extent that it may be found that he has, as lease-holder, received them. The respondent will pay special appellant's costs.

The 20th July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Damages—Injunction—Unlawful collection of rent.

Case No. 3034 of 1863.

Special Appeal from a decision passed by Mr. J. S. Bell, Principal Sudder Ameen of Dacca, dated the 30th July 1863, affirming a decree of the Sudder Ameen of that District, dated the 27th of August 1862.

Nadirjumma Chowdhry (Defendant) *Appellant,*

versus

Ram Chunder Surma and others (Plaintiffs) and others (Defendants) *Respondents.*

Mr. C. Gregory and *Baboo Judoonath Mookerjee* for Appellant.

Baboos Prosunno Koomar Sein and *Luckhee Churn Bose* for Respondents.

Proof of actual damage is not necessary in order to sustain an action for an injunction to restrain the defendant without any title from collecting from the ryots of the plaintiff's estate 2 annas rent over and above the full 16 annas in the rupee.

Seton-Karr, J.—This case has been very fully argued before us on the grounds that the plaintiff discloses no legal cause of action; that he does not show himself to have received any positive injury by the act of the defendants; that he merely hints at his anticipation of injury at some future day; and that the order of injunction is wrong and should be re-called.

The facts are that the defendants are legally in possession of an estate called Baghmara and are collecting the rents thereof; but under color of an old farm once held by the person through whom they derive, the defendants are also collecting two annas of rent from the ryots of another estate called Joy Sing. It is not asserted that the defendants can show any title to any share in this latter estate. It is only urged that the lands of the two estates are intermixed, and that the plaintiffs only represent the interests of 9 annas in the estate, the remaining shareholders not having joined them in the action and having been made *pro formâ* defendants.

We are of opinion that, even though no actual damage be shown to have been caused to the plaintiffs, the action will still lie. The defendants not being able to show any title whatever to any lands or to any shares in Joy Sing Talook, are there simply as tres-

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passers, and the plaintiffs have a full right to ask for an order restraining them from the commission of acts whereby the interests of the rightful shareholders of this estate may be prejudiced, and no one can say how soon such a prejudice may be caused. It is obvious that if a person without any title be permitted to collect from the ryots two annas of rent over and above the full sixteen annas in the Rupee, there is no saying how soon difficulties and complications, and injury to the lawful shareholders of the 16 annas may not ensue. Eighteen annas cannot be collected where only one Rupee is due without injury to some person, and the plaintiffs, as the persons liable to be affected, have a perfect right to restrain the trespassers from acts done without title or foundation in law and directly tending to damage.

On the understanding, therefore, that the injunction to the defendants is intended to restrain them from collecting any rent from the ryots of Joy Sing Talook as the rent of that Talook, we see nothing to call for our interference. An action of ejectment might, perhaps, have been the better way of trying the point at issue, but the present suit does disclose a sufficient cause of action and may stand. Appeal dismissed with costs.

The 20th July 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Cattle Trespass—Damages (mode of assessing.)

Case No. 19 of 1864.

Special Appeal from a decision passed by Mr. James Reily, Principal Sudder Ameen of Dinagepore, dated the 6th October 1863, *affirming a decision of the Sudder Ameen of that District, dated the* 31*st January* 1863.

Suriutoollah Chowdhry and others (Defendants) *Appellants,*

versus

Madur Bux Chowdhry (Plaintiff) *Respondent.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Debendernarain Bose for Respondent.

Taking the amount stated by each of several witnesses and striking an average of the total amount, is not a proper mode of assessing the amount of damages sustained by the plaintiff in respect of the injury done to his crops by the defendant's cattle.

Morgan, J.—The mode adopted by the Lower Appellate Court of ascertaining the amount of damages sustained by the plaintiff in respect of the injury done by the cattle of the defendant to the plaintiff's crops, is an improper one. The Court takes the amount stated by each of the witnesses of the plaintiff, (the witnesses being seven in number), the amount so stated varying from Rs. 1,428 to Rs. 787. The Court then makes an average of the total amount and assesses the plaintiff's damage according to this average. The Court of first instance deputed a Commissioner to make a local enquiry at the place where the damage occurred, and the report of that Commissioner stating such damage at Rs. 250, was adopted by that Court. The Lower Appellate Court does not notice this portion of the evidence before the Court of first instance. The mode of assessing the damages adopted by the Lower Appellate Court is an improper one, which we cannot sanction. The credit and means of knowledge of each witness are assumed by it to be equal. Moreover, it enables to a great extent the plaintiff himself, and not the Court, to fix the amount of damages.

We remand the case in order that the Court may determine, after hearing the evidence to be adduced and satisfying itself concerning the credibility of that evidence, what amount of damage was in fact sustained.

The 20th July 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Appeal—Remand—Local Investigation.

Case No. 2850 of 1863.

Special Appeal from a decision passed by Mr. J. C. Dodgson, Judge of Mymensingh, dated the 20*th August* 1863, *reversing a decision of the Sudder Ameen of that District, dated the* 9*th April* 1863.

Jeebun Kissen Roy and Ramjoy Roy (Defendants) *Appellants,*

versus

Dwarkanath Roy Chowdry (Plaintiff) *Respondent.*

Baboos Romesh Chunder Mitter and *Ashootosh Dey* for Appellants.

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Baboo Kissen Dyal Roy for Respondent.

An order remanding a case for re-trial after a local investigation is one not within the competency of an Appellate Court to make.

Such an order is in effect a decretal order from which an appeal will lie.

Morgan, J.—THIS suit was brought for the possession of land. In the Court of first instance it was held that the suit was barred by limitation On appeal, the Judge was of opinion that without a local investigation and a map of the land in dispute, it was impossible for him to determine whether or not the plaintiff was in possession of the land at a certain time named, and consequently, whether or not his suit was barred by limitation. The Judge reversed the order of the Court of first instance and remanded the case for re-trial after a local investigation.

This order of remand is not one which it was competent to the Judge, in our opinion, to make according to the provisions of the Civil Procedure Code. Sections 351 to 357 of the Code declare the powers of Appellate Courts for the remand of and for the taking of further evidence in cases. If the Judge was unable, upon the evidence before him, to determine the question of limitation, he might have called for further evidence; or he might, it appears to us, under the provisions of Act VIII of 1859 and Act XXIII of 1861, have himself directed a local investigation. But his order remanding the case for re-trial, is one which he was not authorized to make; and unless we are prevented from interfering with it by the provisions of Act VIII, we shall set it aside. The objection made under the 363rd Section of the Act is, that no appeal lies from this order of remand. The order is one by which the decree of the Lower Court is reversed and the case remanded. Such an order is a decretal order, having the effect of a decree, inasmuch as it sets aside the decree of the Court of first instance, and it is not the less a decretal order because it further directs a remand. If the Judge had reversed the decree on the ground that the suit was not barred by limitation, and had thereupon remanded the suit, it could hardly have been contended that such an order was not open to immediate appeal. Such orders are, in effect, "decisions passed in regular appeal," from which a special appeal to this Court is given by the 372nd Section of the Code of Civil Procedure.

In our opinion an appeal lies from this order, and our decision is in accordance with a decision which was cited, dated the 7th August 1863, by the Chief Justice and Mr. Justice Steer, in which it was held that an appeal lies from a decree reversing a decision of the Lower Court and remanding the case to be tried on its merits. Such a decree, it was held in that case, is not an order within the meaning of Section 363 Act VIII of 1859.

We shall allow the appeal. The order of remand is rescinded, and the Judge will proceed under the provisions of the Code to obtain such further evidence as he may consider requisite, without remanding the case for re-trial to the Court of first instance.

The 20th July 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Limitation — Section 9 Act XIV of 1859—Fraud.

Case No. 17 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Behar, dated the 29th September 1863. reversing a decision of the Moonsiff of that District, dated the 27th February 1863.

Sheikh Muksood Ali and others (Defendants) *Appellants,*

versus

Sheikh Gowhur Ali and others (Plaintiffs) *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

Moulvie Syud Murhumut Hossein for Respondents.

The kind of fraud provided for by Section 9 Act XIV of 1859 whereby, in computing the period of limitation, provision is made for extending the time in cases of concealed fraud.

Morgan, J.—THE Lower Appellate Court takes for granted that the defendants have been in possession, and in adverse possession, of the land for upwards of 12 years, and, upon this assumption, applies the 9th Section of Act XIV of 1859 whereby, in computing the period of limitation to be allowed to plaintiffs, provision is made for extending the time in cases of concealed fraud. That Section is inapplicable to the circumstances of the present case. The plaintiff is a purchaser from a widow, and the property purchased is property belonging to her deceased husband. There is no reason to suppose that the widow or the plaintiff has been kept from the knowledge of their rights by means of fraud. The supposed fraudulent circum-

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stances in the case are these,—that the defendants, by means of some collusion with others, are supposed to have obtained possession of the property originally by unfair means, and therefore to hold it fraudulently. That is not the fraud which the Section provides for.

The real question for decision in this case is as follows:—The plaintiff alleges that certain ticcadars held possession of this property on behalf of the widow, paying rent to her up to 1258, and that in 1259 the defendants fraudulently obtained possession from the ticcadars. If the plaintiff can establish the widow's possession by means of the ticcadars up to the year 1258, then this suit having been brought within 12 years from that time, the Law of Limitation is inapplicable.

The case will be remanded, and the Lower Appellate Court, in deciding the question of limitation, should consider the proof offered (whatever it may be) respecting the possession of the widow by means of the ticcadars within any period short of 12 years before the commencement of the suit.

Special Appeal No. 31 of 1864, connected with the plaintiff's suit for declaration of title, will be dismissed with costs.

The 21st July 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Irrigation—Damages.

Case No. 3112 of 1863.

Special Appeal from a decision passed by Mr. W. T. Tucker, Officiating Additional Judge of Behar, dated the 29th July 1863, modifying a decision of Baboo Tarrakant Biddiasagur, Principal Sudder Ameen of that District, dated the 21st August 1862.

Punnun Sing (Defendant) *Appellant*,

versus

Sheik Meher Ali (Plaintiff) *Respondent*.

Mr. J. Baptist for Appellant.

Mr. C. Gregory for Respondent.

In a suit for damages for loss of cultivation by the cutting of a bank, the plaintiff is entitled, not merely to the rent of the land, but also to the profits of cultivation.

Norman, C. J.—This is a suit for cutting the bank of a reservoir in the plaintiff's land. The plaintiff claimed rupees 1,601-8 as the value of the produce which would have grown on the land irrigated by the reservoir, had the bank not been cut. The first Court awarded to the plaintiff rupees 149-11-10, (with interest rupees 161), which is simply the rent of the land.

Now the plaintiff's estimate is clearly too large, because to realize the 1,601 Rs, the plaintiff would have had to defray the costs of cultivation and pay the expense of seed, &c. But to award merely the rent for the period during which the land produced nothing in consequence of the wrong done, is to estimate the damages on a wrong principle, because the plaintiff must not only have lost the rent, which he would have paid for that which was useless to him, but all his profits as tenant of the land.

The objection that the damages had not been properly enquired into, appears on examination to have been taken before the Judge by the respondent, who takes an objection before us by way of cross-appeal under Section 348. The case must therefore be remanded for a proper and full enquiry as to damages, and the Judge must estimate, as well as he can, the loss which the plaintiff has sustained, remembering always that it is not possible for the plaintiff to give precise and definite proof of that which must be, in its nature, to a great extent uncertain and conjectural.

The costs of this appeal will abide the result of the enquiry.

The 21st July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges*.

Estoppel.

Case No. 3471 of 1863.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Officiating Additional Judge of the 24 Pergunnahs, dated the 3rd October 1863, affirming a decision passed by Baboo Pearee Lal Banerjee, Moonsiff of Manickgunge, dated the 14th May 1863.

Sheikh Muttaoollah and others (Defendants) *Appellants*,

versus

Mussamut Begum Bewah and others (Plaintiffs) *Respondents*.

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Moulvie Aftabooddeen Mahomed for Appellants.

Baboo Neel Madhub Sein for Respondents.

Plaintiffs were held not debarred from obtaining certain rights now, because they did not urge them when they had no title to them.

Jackson, J.—This was a suit to obtain possession of 3 cottahs 15 chittacks of land. The plaintiffs, mother and daughters of one Busheerooddeen, claimed this land by right of inheritance from Busheerooddeen, who, they say, inherited it from his aunt, Mahtah Bebee. The defendants admit that Mahtah Bebee with her sister, Ahtah Bebee, were formerly the owners of 15 cottahs of land, of which the disputed 3 cottahs 15 chittacks is the one-fourth portion, but they allege that Ahtah Bebee sold these 15 cottahs to one Nobo Khan from whom it came to Jameendar Khan, and, as Jameendar Khan's property, it was put up to sale in execution of a decree and was purchased by defendants. Subsequently, not being able to obtain possession. defendants brought a suit against Jameendar Khan and Ahtah Bebee, and in 1856 obtained a decree, and in execution gained possession of it. The defendants have in both Courts put forward this decree as a final and conclusive adjudication of the right to the 15 cottahs of land having vested in Jameendar Khan, and by their purchase in defendants.

The Lower Courts have, however, found that that decree is no bar to the hearing of this claim, inasmuch as this claim is to obtain possession of the share of Mahtah Bebee, who, it is admitted, did not sell her rights in the land and who was no party to the suit in which that decree was passed; and as Mahtah Bebee's rights are admitted, the Lower Courts have decreed the plaintiff's claim to obtain possession of these 3 cottahs 15 chittacks as heirs of Mahtah Bebee.

On special appeal it is said that Busheeroodden, if no party to that former suit, was present at the hearing as a witness, and deposed to the execution of the deed of sale by Ahtah Bebee in favor of Nobo Khan; that one of the present plaintiffs, Mukhun Bebee, a sister of Busheeroodden, was a party to the suit; and that if they held any claim to the land in dispute, they should then have preferred it; not having done so, their claim cannot now be heard.

It does not appear that at that time Mahtah Bebee was dead. Busheeroodden and Mukhun Bebee had not at that time any rights to the land, which they could legally put forward. They have since inherited Mahtah Bebee's rights, and they are not debarred now from obtaining those rights, because they did not urge them when they had no title to them. The decree in question would have been good against Mahtah Bebee as well as Ahtah Bebee, had the former been a party to the suit and concealed her rights. But Mahtah Bebee was no party to it. Her rights were not affected by the decree passed in it, and it follows that plaintiffs' present rights as her heirs are not affected by it.

The appeal must be dismissed with costs.

The 21st July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Minor (Proof of being).

Case No. 3259 of 1863.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Hooghly, dated the 17th August 1863, affirming a decision passed by the Moonsiff of that District, dated the 31st January 1863.

Kalee Holdar (one of the Defendants) *Appellant,*

versus

Sreeram Ghose, for self and as guardian of Kishen Chunder Ghose, minor (Plaintiff) *Respondent.*

Baboo Kishen Sooca Mookerjee for Appellant.
No one for Respondent.

It is not sufficient for a Court to look in a man's face and to pronounce that he is a minor, the more particularly when he has on other occasions acted as a major. The Court should call upon him to produce direct evidence as to his age and come to a finding thereon.

Loch, J.—This case must be sent back for a proper investigation as to the age of Kishen Chunder. It is not sufficient for a Court to look in a man's face and to pronounce that he is a minor, the more particularly when he has, on other occasions, acted as a major, as we see that Kishen Chunder has done in bringing a suit jointly with his brother on 24th December 1861, in which he says nothing of his being a minor, but sues as one of full age. The Principal Sudder Ameen will call upon him to produce direct evidence as to his age and come to a finding thereon. The appeal is decreed with costs.

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The 21st July 1864.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Confirmation of title—Possession.

Case No. 3267 of 1863.

Special Appeal from a decision passed by Moulvie Syud Ahmed Buksh, Principal Sudder Ameen of Sylhet, dated the 7th September 1863, *reversing a decision passed by Baboo Kaseenath Dass, Moonsiff of Lushkerpore, dated the* 16*th May* 1863.

Jussoda Dassee (Plaintiff) *Appellant,*

versus

Sheik Mahomed Fukeer and others (Defendants) *Respondents.*

Baboo Tarrucknath Sein for Appellant.

Baboo Dwarkanath Mookerjee for Respondents.

Where a suit for confirmation of title is brought and dismissed for want of proof of title, the Court need not go into the question of possession.

Loch, J.—This suit was brought for confirmation of title and alteration of the thakbust. Plaintiff claimed under a deed of sale from her husband, who some time previously had purchased from the defendant's ancestors. The Lower Appellate Court finds that there is no satisfactory proof of the original transaction and consequently the plaintiff has no title.

In special appeal it is urged that, as plaintiff came in on possession and sought confirmation of title, and the defendant denied her possession, it was not sufficient to dispose of the question of title; but the fact of possession should have been gone into. This, we think, is unnecessary. If plaintiff be found to have no title, she has certainly no right to expect confirmation of title, which is the only thing she asks for; and if she is in possession, she is so without title, and must be looked upon as a trespasser. We dismiss the appeal with costs.

The 22nd July 1864.

Present :

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Right of Zemindar in Trees grown by Tenant—Declaratory Suit.

Case No 3561 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, dated the 2nd October 1863, *reversing a decision passed by the Moonsiff of that District, dated the 23rd May* 1863.

Sheik Abdool Rohoman (Plaintiff) *Appellant,*

versus

Dataram Bashee (Defendant) *Respondent.*

Mr. J. Baptist for Appellant.

Baboo Nil Madhub Sein for Respondent.

A zemindar has a right in the trees grown on the land by the tenant; and although the tenant has a right to enjoy all the benefits of the growing timber during his occupancy, he has no power to cut the trees down and convert the timber to his own use. The zemindar may sue to have his title in the growing trees declared.

Levinge, J.—This was a suit by a zemindar to be maintained and supported by a decree of the Court in his rights as zemindar to fruit trees grown on the land by the ryot. It is found in the suit that the lease is silent as to rights of timber.

The first Court found that the ryot had no right to cut down the trees, but that he had a right to all the enjoyment of the trees as long as they should grow on the land.

The Lower Appellate Court reversed that finding, and dismissed the plaintiff's suit.

We hold that the plaintiff had a right to bring this suit to have his title in the growing trees declared, and obtain a declaration from the Court that the pretentions of the ryot were not legal.

We are of opinion that the zemindar has a right in the trees which the Court should maintain; and that, although the tenant has a right to enjoy all the benefits that the growing timbers may afford him during his occupancy, he has no power to cut them down and convert the timber to his own use. We affirm this appeal with costs, upholding the decision of the first Court.

The 23rd July 1864.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Special Appeal—Evidence—Right of Water—Presumption.

Case No. 3491 of 1863.

Special Appeal from a decision passed by the Judge of Behar, dated the 23rd September 1863, *affirming a decision passed by the Principal Sudder Ameen of that District, dated the 25th August* 1863.

Sreemutty Bundhoo Sookoolany (Plaintiff) *Appellant,*

versus

Maharaja Joy Prokash Singh Bahadoor and others (Defendants) *Respondents.*

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Messrs. W. A. Montriou and *J. Baptist* for Appellant.

Messrs. G. C. Paul and *C.* and *G. Gregory* and *R. E. Twidale* for Respondents.

The omission to record an opinion on one of many items of evidence (*e. g.* an Ameen's report) is not such an error in law as to come within the scope of the provisions for special appeals.

No presumptions of law in regard to rights of water are known in this country, but proof of ancient reasonable user by particular recognized means is sufficient to give the right.

Bayley, J.—In this case plaintiffs sued for the maintenance of some earthworks by which irrigation was secured to him, and for damages. They alleged that the mounds were ancient and of long standing. The defendant denied these allegations. The Principal Sudder Ameen put in issue whether any, and which, of the alleged mounds had previously existed, and whether there had been a customary user of irrigation by means of them. The Principal Sudder Ameen then, taking into consideration the evidence of the plaintiff's witnesses, and comparing the survey and Ameen's maps, the correctness of which latter it is stated "the plaintiffs admit," and considering also the map and proceedings of the Deputy Magistrate on a local investigation, and relying also upon defendant's witnesses, decides that plaintiff's allegations were not proved, and dismissed his suit. The Judge on appeal taking up the survey map and so tracing the course of the river Tikaree and of a branch of it, and then comparing the result and general bearing with the Ameen's map, finds them to agree. The Judge then differs from the Principal Sudder Ameen as to the contradiction considered by the latter to exist in regard to the evidence given in this case and that in the Fouzdaree Court by the same witnesses. He then finds as a fact on the evidence that the allegation that plaintiff and his ancestors had long made bânds over the river was not proved; further, that user of the water by such works had not been proved either for 12 or for 60 years. The Judge goes on to use these words:—"Plaintiff says defendants destroyed his bânds. "Defendants say they did not, for there were "none; and I consider plaintiff has not at all "proved that there were such bânds and that "they were destroyed; and defendants have "proved their statements."

The Judge, moreover, records "that plaintiff can have no right to make any bând at all over any part of the river," and relies upon passages in the S. D. A. Reports, July 27th, 1857, page 1324, and 28th November 1860, page 301, declaring certain legal principles as to easements, the rights of prescription, and reasonable right of benefit in respect to water running in a natural channel. The Judge concludes by finding that plaintiff cannot claim any right to infringe defendants' reasonable use of the water by the earthworks which plaintiff wishes maintained.

The Judge then concurs with the Principal Sudder Ameen in dismissing plaintiff's suit, and a special appeal is made by plaintiff.

It is urged,—

I. That there is a defect in the investigation in law affecting the decision on the merits in that the Ameen's report has not been considered by the Judge.

II. That the Judge has misapplied the law in regard to prescriptions and easements as to water in this case.

Judgment.

On the *first* point, it is quite clear to us that the reasons for rejecting the Ameen's report have not been recorded by the Judge. He has merely referred to the map of the Ameen as to comparing it with the survey map in respect to the bearing and course of the Tikaree river and its branches. The opposite side have pleaded that the map and report of the Ameen are so far one that the Judge, in considering the map, has also considered the report; and that therefore no special appeal upon this point will lie. We think this is not so, because, as before remarked, the map has only been referred to incidentally, and the report not at all.

But will a special appeal lie because the report of the Ameen has not been stated by the Judge to have been considered by him? We would here remark that every other portion of the evidence appears to have been weighed and decided upon by the Judge. We have perused the report of the Ameen, and certainly it is a full, careful, and as far as we can judge, an impartial report. The report of the Ameen of his local investigation is of itself legal evidence, and, in a case of this kind, if the Ameen be trustworthy and intelligent, evidence of the most material kind. But at the same time, it is to be remembered that the local Magisterial and Police Officers have also made local enquiries, and that their views are against plaintiff's claim.

We have been referred to a case decided by Mr. Justice Steer and Mr. Justice Levinge dated 15th August 1863. But in that case, the Principal Sudder Ameen had disregarded the reports both of the Moonsiff and of the Ameen

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who had recorded the results of their local investigations, and the judgment (of the Principal Sudder Ameen) was almost bare of reasons. The state of the facts is not to this extent.

We have also got before us a decision of Mr. Justice Loch and Mr. Justice Glover, dated 8th July 1864, where the case was remanded—the Court below "fixed the rates "simply on some *exparte* decrees for rent "and entirely ignored the *three* several reports "of the Civil Court Ameens, and the Prin-"cipal Sudder Ameen accepted the finding "without remark." The Judges add—"Now, "had the Principal Sudder Ameen based his "opinion upon evidence as regards the rate of "rent leviable, we could not, on special appeal, "have interfered with his decision; but *ex* "*parte* summary decrees are no evidence at "all of the rate of rent leviable."

Here there is no doubt that the Judge has considered evidence of witnesses and other evidence of local investigation and surveys, and it is only the one item of the Ameen's report on which no specific opinion has been recorded. On the whole, we do not consider that, under the facts of this case and with reference to the evidence and local investigation which have been considered, the omission to record a decision on the Ameen's report is sufficient ground to admit a special appeal, and the whole current of decisions is to the effect that the omission to record an opinion on one of many items of evidence is not such an error in law as to come within the scope of the provisions for special appeals.

On the *second* point we need only observe that the Judge's presumptions of 12 and 60 years are irrelevant. No presumptions of law in regard to rights in respect to water are known in this country. But the proof of ancient reasonable user, by particular recognised means, is sufficient to give the right.

Here, however, the Judge finds as a fact on the evidence recorded by him (and in the terms which we have before cited in inverted commas) that the plaintiff never had the ancient earthworks by which he alleges the reasonable user of the water of the Tikaree was derived to his benefit, and that they were never destroyed.

There being, therefore, no reason to interfere in special appeal on either of the grounds taken, although it would have been more satisfactory if the Judge had fully given an opinion on the Ameen's report, we dismiss this special appeal with costs.

The 23rd July 1864.

Present:

The Hon'ble Sumbhoonath Pundit and G. Campbell, *Judges.*

Jurisdiction—Section 14 Act VIII of 1859—Survey Awards.

Case No. 3088 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 15th April 1863, affirming a decision of the Moonsiff of that District, dated the 25th August 1862.

Radhamadhub Banerjee (Plaintiff) *Appellant,*

versus

Raja Damoodur Sing Audhaj (Defendant) *Respondent.*

Baboo Romanath Bose for Appellant.

Baboos Greesh Chunder Ghose and *Annund Chunder Bose* for Respondent.

An award of the Survey authorities is an award within the purview of Section 14 Act VIII of 1859. Where land is demarcated as belonging to an estate in one district, it belongs *de facto* to that jurisdiction; and as long as it so remains, the Court of another district has no jurisdiction to entertain a suit in respect of it, but may either reject the claim or return the plaint.

Campbell, J.—THIS was a suit for land on the boundary between two districts. The Courts of Beerbhoom, after enquiry, have struck it off, on the ground that the land has been demarcated by the Survey Authorities in District West Burdwan; and under the provisions of Section 14 Act VIII of 1859, it has been already decided by two Benches of this Court on 13th April 1863* and 18th July 1864† that an award of the Survey Authorities is an award within the purview of Section 14, that the land so awarded is *de facto* for the time in the jurisdiction of the district to which it has been attached by such award, and that all actions must be brought in the jurisdiction to which it is so attached so long as it so remains. The only difference in this case is that it does not clearly appear that there has been any contentious adjudication. Still we think that the land having been demarcated in, and so declared by competent authority to belong to and to be in the area of an estate, village, or known division situated in another District, the principle is the same; that the land is *de facto* in another jurisdiction; and that, while it so remains, the Beerbhoom Court rightly declined jurisdiction.

* Reg. Appeal No. 5 of 1861.
† " " No. 39 of 1864.

* 2 Hay's Reports, p. 485.
† *Ante* p. 360.

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As to the contention that the Courts should not have rejected the claim, but should have returned the petition, we find that Section 14 gives the Court the power either to reject or return; and in the circumstances of this case decided after much enquiry, we think that it was rightly rejected.

We dismiss the appeal with costs.

The 23rd July 1864.

Present :

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Assault—Damages.

Case No. 66 of 1864.

Regular Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 19th December 1863.

Ramjoy Muzoomdar (Plaintiff) *Appellant,*

versus

Dr. C. M. Russell (Defendant) *Respondent.*

Baboos Mohendro Lall Shome, Greeja Sunker Muzoomdar, and *Essan Chunder Chuckerbutty* for Appellant.

Mr. R. T. Allan and *Baboo Mohinee Mohun Roy* for Respondent.

Suit laid at Rs. 10,000.

In a suit for damages for an assault, it was found that the defendant did not commit the assault on the spur of the moment, and the evidence served to show that the plaintiff's language and manner were not rude and provoking. HELD that, though there had been no serious personal injury, and no ground for vindictive damages, still it was a case in which full damages commensurate to the injury and annoyance caused should be awarded.

Campbell, J.—THIS was an action of trespass, for assault and battery, and general injury to person, feelings, and reputation. No special damage is alleged.

We think that we may as well accept the Judge's finding of the facts in its main features. But we are not satisfied that on that finding the damages have been properly assessed. It appears that plaintiff is really a person in a good situation in life and the confidential agent of many landholders and others. To such a person a personal assault of a humiliating character, committed in the presence of several persons with whom he was connected in business and otherwise, would, without doubt, be disagreeable in a high degree. And the assault seems to have been considerable, and wholly without excuse on the part of the defendant. It appears that the defendant, a European Doctor, was attending a native patient, and that the plaintiff (the patient's agent) had expressed an opinion that the sick man was rather weaker than better. This remark excited the indignation of the Doctor, (whose medicine the sick man seems to have declined to take), —he says because it was calculated to depress the sick man. Plaintiff says defendant's indignation was because he feared to lose his patient, owing to his (plaintiff's) advice. But be that as it may, it is clear that, as found by the Judge, defendant did not commit the assault on the spur of the moment, but afterwards returned for the purpose of verbally attacking the plaintiff, and eventually laid hands on him and violently expelled him from the house. The evidence seems to show that, previous to this assault, plaintiff's language and manner were by no means rude and provoking. Under the circumstances, then, though there is no serious personal injury and no ground for the vindictive damages claimed by plaintiff, still we think that defendant is by no means entitled to any special consideration; that it is in no way a case for nominal damages; and that full damages commensurate to the injury and annoyance caused should be awarded. In this view, in modification of the Judge's order, we award to the appellant as damages Rs. 300 with costs of both Courts in proportion to the amount decreed. Defendant is to pay his own costs.

The 23rd July 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Lease (by holder of appanage)—Maintenance—Mining Lease.

Case No. 2508 of 1863.

Special Appeal from a decision passed by Captain H. M. Boddam, Deputy Commissioner of Hazareebaugh, dated the 6th April 1863, *reversing a decision of Guzzuffer Ali, Moonsiff of Khurruckdea, dated the 30th March* 1861.

Messrs. Gordon, Stuart & Co. (Defendants) *Appellants,*

versus

Tikaitnee Seobas Kowaree and another, (Plaintiffs) *Respondents.*

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Messrs. R. V. Doyne, T. T. Forbes, and *C. Sanderson,* and *Baboo Bansemadhub Banerjee* for Appellants.

Mr. C. Gregory and *Moulvie Syud Murhumut Hossein* for Respondents.

Though the holder of a younger brother's appanage has no power of complete and absolute alienation of property of which he has only a limited tenure for maintenance, still a lease granted by him is good as between him and the grantee and those claiming under the grantor, at least during the grantor's life.

Mining leases, like leases for building, are among those which the Regulations particularly favor as being in their nature such as to require a long time for profitable working.

Campbell, J.—THIS is a suit by the holder of a Raj estate to set aside a mokurruree lease of certain lands, granted by the holder of a younger brother's appanage, (or Babooana estate for maintenance carved out of the main estate,) to the Bengal Coal Company for mining purposes.

The Judge seems to have mis-stated the claim as being to recover the property on the ground of breach of the conditions of the tenure. Plaintiff simply seeks to declare the lease void as derogatory to his rights and injurious to the property, since, he says, by the digging of coal the land will be spoilt The decision of the Court below is not very clear or satisfactory. But we think we must take it, as found, that the holder of the appanage has no power of complete and absolute alienation of the property which is granted in a limited tenure for maintenance and is subject to reversionary rights of the head of the family under certain circumstances.

Still, even assuming that to be so, we do not think that the plaintiff is entitled to void this lease during the tenure of the grantor. The tenant in possession of an estate on a somewhat limited tenure, has certainly the right to grant in good faith certain leases. And mining leases, like leases for building, are among those which the Regulations particularly favor as being in their nature such as to require a long term for profitable working. For aught we know, the grantor's tenure may last for a term practically infinite. It is not alleged that the property is let at an inadequate rent so as immediately to defeat the object of the tenure, *viz.* maintenance. And far from injuring the property, we have no doubt that by mining its value is best developed. In the absence, then, of any immediate injury to the plaintiff, we do not think that the mere grant of a lease of portion of the land on tenure, perpetual as between the grantor and the grantee, (that is, we must consider to last as long as the grantor's tenure lasts) gives the plaintiff a right to annul the lease. We consider that for the life of the grantor at any rate, if not longer, it is good. And in modification of the order of the Court below, we dismiss the prayer to annul the lease, but declare that the lease is only good as between the grantee and the grantor and those claiming under the grantor, but shall not hereafter prejudice any rights in the property which may accrue either to the plaintiff and his representatives, or to the descendants of the grantor or any one else claiming in right independent of the grantor, nor any claim on account of injury to the purposes of the tenure, which may arise after the death of the grantor. Each party will bear its own costs in all the Courts.

The 23rd July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Section 246 Act VIII of 1859—Suit to establish title—Appeal—Limitation (Section 14 Act XIV of 1859).

Case No. 3328 of 1862.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 2nd October 1863, *reversing a decision passed by Baboo Anund Chunder Banerjee, Principal Sudder Ameen of that District, dated the 23rd July* 1862.

Ramdass Baboo (Defendant) *Appellant,*

versus

Messrs. R. Watson & Co. (Plaintiffs) *Respondents.*

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Appellant.

Mr. R. T. Allan and *Baboo Mohinee Mohun Roy* for Respondents.

An unsuccessful claimant, instead of bringing a regular suit to establish his right as provided by Section 246 Act VIII of 1859, chose to file an appeal against the order rejecting his claim. His appeal, though successful before the Lower Appellate Court, having been thrown out in special appeal as illegal under the Section above cited, he now sues to set aside the order rejecting his claim. HELD that he was not entitled, under Section 14 Act XIV of 1859, to deduct from the period of limitation the time during which the appeal proceedings were pending.

Loch, J.—THE property in dispute, Kismut Malenchy, belonged to Radhakisto Dass Chowdhry, and was sold in execution of a decree obtained apparently against Radhabullub, son of the said Radhakisto, on account of a debt due by Radhakisto, and it was purchased by the Messrs. Watson who obtained possession in April 1860.

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Ramdass Baboo, the appellant in this case, obtained a decree against Radhabullub on a bond given by him in July 1859, and proceeded to attach this property in execution.

Objections were taken by Watson against these proceedings; but the Principal Sudder Ameen overruled them and directed attachment to be taken out on 10th May 1861. Watson appealed to the Judge, who reversed the order of the first Court on 28th September 1862. A special appeal was preferred by Ramdass to the High Court, and on 10th April 1863, the order of the Judge was reversed, it being held that the order passed by the Principal Sudder Ameen of 10th May 1861 was passed under the provisions of Section 246 of Act VIII of 1859, and by that Section there could be no appeal, the claimant's only remedy being by suit to set aside the order.

Watson has now brought a suit to set aside that order, and is met by the plea of limitation under Section 246, and the first Court held that the suit was out of time and could not be heard, the provisions of Section 14 Act XIV of 1859 notwithstanding. In appeal, the Judge held the the word "suit" used in Section 14 Act XIV was not to be limited to a regular suit, but comprehended litigation of any kind between the parties, and overruled the decision of the Lower Court on the point of limitation, and then going into the merits of the case, reversed the order of the Principal Sudder Ameen passed on 10th May 1861, and gave a decree for plaintiff with costs.

A special appeal has been preferred from this order—1*st*, on the ground of limitation; 2*nd*, as to the comparative rights of the parties to the property.

On the plea of limitation, it is argued by the appellant, that the appeal preferred by the plaintiff from the order passed by the Principal Sudder Ameen on 10th May 1861, was not a suit within the meaning of Section 14 Act XIV of 1859, and, therefore, the plaintiff was not entitled to a deduction of the time when those proceedings were pending. For the respondent, it is contended that he was misled by the act of the Court, and, under such circumstances, he is entitled, as ruled by the Privy Council in the case of Doorga Pershad Chowdhry, to have the benefit of such error; and secondly, that the word "suit" embraces all litigation carried on between the parties for the same subject-matter and is not confined to a regular suit

We do not think the case of Doorga Pershad Chowdhry applicable to the present case, for the respondent was not misled by the Court in the first instance, but wilfully and deliberately acted illegally in filing an appeal which the law declared that he was not entitled to do. It is said that the claim made by Watson did not come under the purview of Section 246 of the Code of Procedure; but the High Court, in their decision of 10th April 1863, have determined that point, which is not now open to question. Further, the pleader for the respondent, though making this allegation, is unable to point out any other Section of the law under which he proceeded, or under which he was entitled to file a petition of appeal.

Now, we find that Section 246 clearly lays down the law, and points out the mode of procedure to be adopted by a claimant, in the event of his claim being rejected, in the following words:—"The order which may be passed by the Court under this Section shall *not be subject to appeal*: but the party against whom the order may be given shall be at liberty *to bring a suit* to establish his right at any time *within one year from the date of the order*." No words can be clearer than the above, which distinctly tell the losing party that he is not allowed to file an appeal, but may, within a year from the date of that order, institute a suit to set it aside. Yet in the face of this distinct rule, Watson files an appeal, and because the Judge, instead of at once rejecting it, heard and passed an illegal order upon it, he says he has been misled by the Court! The meaning of the word "suit" in this Section of the law is unmistakeable. It can only signify a regular suit to set aside the order adverse to him, and yet Watson, instead of bringing a suit, files an appeal which the law expressly prohibits his doing, and then he claims the benefit of the rule laid down in Section 14 Act XIV of 1859, which rules that the Law of Limitation shall not apply "when the claimant has been engaged in prosecuting a suit upon the same cause of action against the same defendant *bond fide* and with due diligence in any Court of Judicature which from defect of jurisdiction or other cause shall have been unable to decide upon it, or shall have passed a decision which on appeal shall have been annulled for any such cause."

Now, without insisting at present that the word "suit" used in the above passage is limited to regular suits, we think that, in the case before us, it can only bear that

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signification, for the law (Section 246 of Act VIII) only allows a regular suit to be brought ; and were we to read the word as comprehending an appeal, how thoroughly inconsistent would the law be. It would in effect say thus—You shall not bring an appeal to set aside the order, but you shall bring a regular suit for that purpose within one year from the date of the order; but if you wilfully disobey the law and file an appeal and so carry on litigation *bonâ fide* and with due diligence, all the time that the appeal is pending shall not be counted against you. How such litigation can be said to be in good faith, when the law prohibits an appeal and directs the claimant to proceed by suit, the Court do not understand. Under this view of the case, we think that the plaintiff is not entitled to take advantage of the provisions of Section 14 Act XIV of 1859, and having failed to bring his suit within one year from the date of the order passed by the Principal Sudder Ameen on 10th May 1861, his present action is out of time, and his remedy barred by the Law of Limitation. We therefore reverse the order of the Judge and decree the appeal with costs.

The 25th July 1864.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Government Revenue — Sale — Pre-emption.

Case No. 3503 of 1863.

Special Appeal from a decision passed by the Judge of Sarun, dated the 16th June 1863, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 29th August 1862.

Mussamut Wozeer Begum and others (Defendants) *Appellants,*

versus

Mussamut Fuzloonissa and others (Plaintiffs) *Respondents.*

Mr. J. Baptist for Appellants.

No one for Respondents.

Suit by a zur-i-peshgeedar for Government revenue paid by him on account of a share of an estate which the proprietor had sold to a third party and in respect of which the plaintiff had already brought a suit under a title by pre-emption. HELD that the proprietor was not liable from the date of his sale to the third party, and that, until the pre-emption suit was decided, the plaintiff could have no claim to recover the money from the purchaser.

Jackson, J.—THE plaintiff, as zur-i-peshgeedar, had paid into the Collectorate the Government revenue of one anna fourteen gundahs of Mouzah Butterlall, Purgunnah Goah, from 1258 to 1268, and now sought to recover from the defendant, the malik of the estate. the sum so paid on his account. It appeared that the malik had sold that share of his estate in the year 1259 to a third party. The plaintiff, accordingly, made the purchaser a defendant also in the suit, and urged his liability also.

The first Court found that plaintiff had, on the sale in 1259, set up claims to this share of the estate on his own account under a title by pre-emption, and had preferred a suit under this title, which suit was still pending, and on this ground, held that the plaintiff could only recover from the malik defendant the rents due anterior to the sale.

On appeal the Principal Sudder Ameen found that the purchaser had not been in possession under his purchase which was in contest, and on this ground decreed the whole claim against the malik.

On special appeal it is contended for the malik, that he sold his rights in 1259, and that he is no longer liable for the revenue of the estate. We think the Lower Appellate Court was in error. The proprietor or malik was not liable from the date of his sale to the third party. If the plaintiff's title by pre-emption is found to be good, he is himself liable for this revenue, and cannot recover it from any one. Until the pre-emption suit is decided, the plaintiff can have no claim to recover the money from the purchaser, and certainly he has no claim against the former malik.

The Principal Sudder Ameen's decision must be reversed, and the decree of the first Court awarding only the revenue paid prior to the sale confirmed. The plaintiff will pay the costs of the two Appellate Courts with interest.

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The 25th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Execution — Marshalling of Liabilities.

Case No. 1820 of 1863.

Special Appeal from a decision passed by Mr. E. F. Lautour, Judge of Patna, dated the 25th March 1863, *modifying a decision of Moulvie Syud Sukhawut Hossein, Principal Sudder Ameen of that District, dated the 9th December* 1862.

Mussamut Nowa Koowar (Plaintiff) *Appellant,*

versus

Sheikh Abdool Ruheem and others (Defendants) *Respondents.*

Baboo Kissen Succa Mookerjee and *Moulvie Syud Murhumut Hossein* for Appellant.
Mr. C. Gregory for Respondents.

The plaintiff had a lien on three estates belonging to his debtor, and a third party having obtained a decree for money due from the same debtor, recovered his money by the sale of one of the plaintiff's three mortgaged estates. HELD that the sale did not release that estate from the mortgage, but that it forced the plaintiff to take measures in the first place to recover the amount due to him from the remaining estates included in his mortgage deed, and that, if any balance remained after he had realized all he could from these two remaining estates, he could then return to the third estate to recover the balance.

Jackson, J.—THE plaintiff in this suit obtained a zur-i-peshgee lease of Martial Bazaar, 6 annas in Mouzah Anoopnuggur, and 6 annas in Mouzah Bank, for an advance of rupees 6,000 made to the defendants Abdool Ruheem and Munnoo. Subsequently, the rights of those defendants in Martial Bazaar were put up to auction in execution of a decree obtained by other parties, and purchased by Atwa Ram. The plaintiff now sues Atwa Ram to recover from him a proportionate share of the rupees 6,000, *viz.*, rupees 1,800, which he alleges is recoverable specially from the Martial Bazaar property.

The first Court decreed to the plaintiff the right to hold the Martial Bazaar property liable for the rupees 1,800.

The Judge, on appeal, reversed this decision, holding that the mortgage deed did not specify any particular sums as recoverable from each of the three estates mortgaged, but that it bound the whole of the three properties liable for the whole or any portion of the debt, and that the plaintiff consequently still had his remedy both against the Anoopnuggur and Bank estates, as well as against the debtors personally.

The ground of special appeal is that the mortgagee is at liberty to realize any portion of the money due to him from any portion of the land mortgaged to him, and that he is consequently entitled to hold Martial Bazaar liable for this 1,800 rupees.

It appears that, in this case, the plaintiff had a lien on three estates belonging to his debtor, and that a third party having obtained a decree for money due from the same debtor, recovered his money by the sale of one of the plaintiff's three mortgaged estates. This sale does not release that estate from the mortgage, but it forces the plaintiff to take measures in the first place to recover the amount due to him from the remaining estates included in his mortgage deed. If any balance remains after he has realized all which he can realize from these two remaining estates, he can then return to the third estate to recover the balance. No injustice is done to the plaintiff by requiring him to take satisfaction out of funds which are within his power for this purpose, and so placed by the deed; while, on the other hand, very great injustice might be done to other parties by allowing plaintiff to proceed against the estate which has been already sold. The principle of equity on this subject of marshalling of liabilities is very clearly laid down in the Text Books, (Chapter XIII, Story's Equity Jurisprudence.)

It was stated during the argument on the appeal that the plaintiff had released his debtor from all further liability on the Anoopnuggur and Bank estates, as the sums due on those estates had been recovered. The Judge has very clearly proved that this sum of rupees 1,800, now in dispute, was mortgaged on the *whole* of these estates. If, then, the plaintiff has entered into any new and subsequent contract, varying the terms of the first contract, he cannot thereby injure the rights of parties who have succeeded to the interests of his debtor prior to the subsequent contract.

We see no reason to interfere with the Judge's decision, and dismiss this appeal with costs and interest.

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The 25th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Limitation—Mortgage—Ejectment.

Case No. 3585 of 1863.

Special Appeal from a decision passed by Baboo Madhub Chunder Chowdhry, Additional Principal Sudder Ameen of Dacca, dated the 28th November 1863, *reversing a decision passed by Syud Saadut Hossein, Moonsiff of Naraingunge, dated the 20th November* 1862.

Ram Coomar Sein and others (Defendants) *Appellants,*

versus

Prosunno Coomar Sein and others (Plaintiffs) *Respondents.*

Baboo Kallee Mohun Dass for Appellants.

Baboo Anund Gopal Palit for Respondents.

The rule that the date of expiry of the year of grace is the date from which a mortgagee's cause of action to obtain possession of the mortgaged estate is to be calculated, applies only where the mortgagor remains in peaceable and undisturbed possession of the estate. But where the mortgagor is dispossessed and his title disputed, and another person obtains possession of the estate, the possession of the new holder becomes adverse to both mortgagor and mortgagee. The mortgagee's cause of action against the new holder will count from the date on which the latter obtained such adverse possession, unless where the mortgagor contests the title of the new holder and a litigation ensues between them, in which case the mortgagee is not bound to take action upon his mortgage until that litigation is decided. But if the mortgagor's title is rejected and his possession is disturbed by an adverse one, the mortgagee's cause of action against the new holder commences from the date on which the latter obtains possession on his title adverse to the mortgagor, which has been confirmed by the Courts.

Jackson, J.—The plaintiffs, Ramdullub Sein and others, heirs of Goluck Chunder Sein, brought this suit to obtain possession of certain lands. They alleged that these lands were mortgaged to them in the year 1830, by their then owners, Madhub Chunder Shurma and Cally Churn Shurma; that the necessary proceedings, with a view to foreclose, were taken in the year 1856; that the mortgage not having been redeemed, they, plaintiffs, are now entitled to possession, and that they find that the defendants have by a false kabala obtained possession of the land from their mortgagors. They now sue to dispossess the defendants and obtain possession themselves.

The defendants deny that any such transaction ever took place. They assert that the mortgagees never had any title to these lands; that the lands had been purchased in the names of the mortgagors, but that so far back as 1830, there was a lawsuit between them and the Surmas as to the title to this property, and that this was finally decided in their, defendants', favor on appeal in the Sudder Court in 1837; that from that time to this, defendants have been in possession of the lands, and that, therefore, even if the transaction did take place as alleged, still the plaintiff's suit is barred by limitation.

The Moonsiff held that the plaintiff was barred by limitation on his own admissions; that his mortgage was by his own account redeemable in 1831; that his cause of action on the mortgage, consequently, arose in that year; and 12 years having elapsed, his suit was barred.

The Judge, on appeal, was of opinion that this view of the law was erroneous; that the plaintiffs were not bound to foreclose the mortgage immediately the amount lent upon it became due; and that the plaintiffs having foreclosed and having now brought their suit within 12 years of the date on which the year of grace expired, their suit was not barred by limitation. The Judge, accordingly, reversed the Moonsiff's decision and remanded the suit for investigation on the merits.

The defendants prefer this special appeal from that decision, and contend that their possession has been adverse to the plaintiffs' mortgagors, and it follows adverse to the plaintiffs; that they have held such adverse possession for more than 12 years, and that the plaintiffs' suit should, therefore, be dismissed under the Law of Limitation.

The question to be decided is, When did plaintiffs' cause of action arise? They have alleged that the date of expiry of their year of grace is the date from which the cause of action should be calculated. This may be the rule in those cases where the mortgagor remains in peaceable and undisturbed possession of the estate mortgaged. But that rule no longer stands good when the mortgagor is dispossessed, and his title disputed, and another person obtains possession of the estate. The possession of this new holder becomes a possession adverse to both the plaintiff's mortgagor and to the plaintiff, the mortgagee. If the mortgagee submits to this possession for more than 12 years, he loses his right to contest the title of the new holder. His cause of action against the new holder arose on the date on which the latter obtained such adverse pos-

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session of the mortgaged estate. Circumstances may occur which will defer the mortgagee's cause of action. If the mortgagor, for instance, contests the title of the new holder, and a litigation ensues between them, the mortgagee is not bound to take action upon his mortgage until that litigation is decided. But if the mortgagor's title is rejected, and his possession is disturbed by an adverse one, the mortgagee's cause of action against the new holder commences from the date on which the latter obtains possession on his title adverse to the mortgagor, which has been confirmed by the Courts. This is the law on the subject which has been laid down in the Privy Council, Prannath Roy Chowdhry *vs.* Rookeea Begum (Moore's Indian Appeals, Volume VII). The possession of the new holder may be adverse to the mortgagor, but still not adverse to the mortgagee. For instance, if he has purchased the rights and interests of the mortgagor, he would still hold those rights subject to the lien of the mortgagee. Looking to the facts, this is not the case with the property now under dispute. The defendants do not assert that they purchased from the mortgagor. They state that they purchased *in the name of* the mortgagor, and that on the mortgagee setting up a title adverse to theirs, they contested the title in the Civil Court, and obtained a decree confirming their rights to the property. The plaintiffs have not denied the defendants' statements on this point. If they had, the Moonsiff would have raised an issue upon it, as he has raised issues on all the other disputed points in the case. The plaint includes no statement upon which these assertions of the defendants can be held to be denied. It states that the defendants obtained possession under a false and collusive kubala. It does not say from whom this kubala was obtained. It is now said, on the hearing of this appeal, that the defendants obtained possession under a kubala from the mortgagors, but no date is given; and the defendants distinctly assert that they hold under no such title. And it is not shewn that even in the petition of appeal to the Lower Court, there was any allegation on the part of the plaintiffs that the defendants held under a title derived from the mortgagors.

There is no doubt that the defendants have been in peaceable possession of the estate for more than 12 years. They plead that plaintiffs' suit is barred by limitation. It is for plaintiffs to shew that they are within time, and that their cause of action has arisen within that time. They have not shewn this. Their suit is, consequently, barred by limitation The Judge's order must be reversed, and the suit dismissed with all costs and interest.

The 25th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Jurisdiction—Execution—Interpretation of decrees.

Case No. 3577 of 1863.

Special Appeal from a decision passed by the Judge of Behar, dated the 8th October 1863, *affirming a decision of the Principal Sudder Ameen of that District, dated the* 30*th March* 1863.

Tareknarain Singh and others (Plaintiffs) *Appellants,*

versus

Puncha Singh and others (Defendants) *Respondents.*

Baboo Kissen Succa Mookerjee for Appellants.

Moulvie Syud Murhumut Hossein for Respondents.

A suit will not lie to enforce the execution of a decree in another suit. The Courts must be left to interpret their own decrees.

Jackson, J.—This was a suit to enforce the execution of a decree obtained in another suit. The plaintiff avers that under that decree he was declared entitled to possession of a certain water-course, although his claim for damages for shutting up that water-course had been dismissed; but that the Courts, in executing that decree, had held that his whole claim had been dismissed.

Both the Lower Courts have held that no such suit will lie, Construction No. 1129 barring it under the old Procedure, and Section 283 Act VIII of 1859 under the new Procedure.

It is contended in special appeal that this suit will lie; but we agree with the Lower Courts that it is inadmissible, and that the Courts must be left to interpret their own decrees in execution. The plaintiff admits that he might have preferred a special appeal from the order in execution and thereby obtained his remedy, but that he neglected to do so.

The order of the Lower Court being correct in law, we cannot interfere, and dismiss this appeal with costs and interest.

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The 25th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Confiscated property — Limitation — Section 20 Act IX of 1859.

Case No. 3516 of 1863.

Special Appeal from a decision passed by Mr. E. F. Lautour, Judge of Patna, dated the 11th August 1863, affirming a decision passed by the Sudder Ameen of that District, dated the 1st April 1863.

Nundun Singh (Defendant) *Appellant,*

versus

Mussamut Bibee Koolsoom (Plaintiff) *Respondent.*

Baboo Mohendro Lal Shome and *Moulvie Murhumut Hossain* for Appellant.

Mr. John Baptist for Respondent.

According to Section 20 Act IX of 1859, a suit for possession of confiscated property under title must be brought within one year of attachment or seizure. Proceedings to foreclose are not the *suit* contemplated by that law.

Bayley, J.—In this case the special appellant is a party claiming, under a mortgage, a right in the estate of one Golam Abbas, a rebel, whose property was confiscated. Her plea urged here, now, is that limitation should in this case be calculated from the date of proceedings for foreclosure. Both parties admit that, if the limitation should be calculated from that date, the special appellant is within one year; but if it be taken from the date of "attachment or seizure," the special appellant is not within time.

It is pressed on us by special respondent that the confiscated property was sold with notice of her mortgage.

We observe that, on her claim being put before the Collector, it was ordered that when the confiscated property should be sold, there should be a mention of the *claim* (be-beaindavi) of this and other mortgagors and claimants. But in that proceeding there is no admission of the validity or otherwise of the mortgage. Now, it is shown that this suit was *not* brought within one year from "attachment or seizure," and we read Section 20 Act IX of 1859 clearly to require that the suit for possession under title shall be brought within one year of "attachment or seizure." The proceedings to foreclose are not the "suit" contemplated by the law cited. The law enacts that all claims on title shall, whatever be the title, be brought within the period specified. This suit, on the title of mortgage, not being so brought, is beyond time and is, therefore, barred by the law quoted.

The special appeal is decreed and plaintiff's suit dismissed with costs.

The 26th July 1864.

Present:

The Hon'ble C. Steer and W. S. Seton-Karr, *Judges.*

Limitation—Suit against Trustee.

Case No. 3497 of 1863.

Special Appeal from a decision passed by Baboo Gobind Chunder Chowdry, Principal Sudder Ameen of Beerbhoom, dated the 24th September 1863, reversing a decision of Moulvie Kadim Hossein Khan, Moonsiff of that District, dated the 23rd January 1863.

Bacharam Chowdry and another (Plaintiffs) *Appellants,*

versus

Mahtab Beebee and others (Defendants) *Respondents.*

Baboo Kissen Succa Mookerjee for Appellants.

Baboo Luckee Churn Bose for Respondents.

In a suit by the purchaser of a share of a Mahomedan lady in her father's property against her brother,—Held that limitation could not apply, as, while the property was in the hands of the brother, it was in the hands of a trustee and not in adverse possession.

Steer, J.—The plaintiff is the purchaser of the share of Mofeezun, who was the daughter of FuttahAli, to whom the land in suit indisputably belonged.

The defendant is the wife of Mahomed Ali, the son of Futtah Ali, and she claims the property under a gift from Mahomed Ali, and pleads limitation in bar of the plaintiff's suit.

The first Court found that limitation did not apply, and that the plaintiff, who represented the rights of Mofeezun, was clearly entitled to her share of her father's inheritance. The Principal Sudder Ameen held that the plaintiff's suit was barred by limitation, and dismissed it.

We think limitation cannot apply in this case. The plaintiff is a purchaser two years ago from Mofeezun. It is not alleged that she received her share of her father's inheritance out of any other lands belonging to her father, and it is not even said that the father had any other lands than those which are in the possession of the defendant. Her right to her share in the property in suit cannot there-

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fore be affected by limitation, as, while the property was in her brother's hands, it was in the hands of a trustee, and not in adverse possession. As there has been no limitation, and as it is clear Mofeezun has a right to a ⅓rd share in the property of her father, and there is no other such property but what is in the defendant's possession, we hold that the Principal Sudder Ameen was quite wrong in disturbing the decision of the Lower Court, which decreed the plaintiff's right as the purchaser from Mofeezun of the share of Mofeezun. We accordingly admit the special appeal, and reverse the decision of the Principal Sudder Ameen with costs, and affirm the decision of the first Court.

The 27th July 1864.

Present:

The Hon'ble W. Morgan and G. Campbell, *Judges.*

Limitation—Award under Act XIII of 1848—Ineffectual Appeal.

Case No. 48 of 1864.

Special Appeal from a decision passed by Mr. R. Abercrombie, Judge of Dacca, dated the 30th April 1863, reversing a decision of Moulvie Syud Ahmed Bux Khan Bahadoor, Principal Sudder Ameen of that District, dated the 22nd March 1862.

Gholam Durbesh Chowdry and others (Plaintiffs) *Appellants,*

versus

Sham Kishore Roy and others (Defendants) *Respondents.*

Mr. G. Gregory for Appellants.

Baboos Romesh Chunder Mitter and *Luckee Churn Bose* for Respondents.

Where a person appealed from an award of a Collector under Act XIII of 1848, which appeal was struck off for default of prosecution, and he then sued to set aside the award,—HELD that limitation commenced to run from the date of the award, and not from the date of the order in the ineffectual appeal proceedings.

Morgan, J.—WE think that in this case the Lower Appellate Court rightly held that the suit was barred by limitation, more than three years having elapsed from the final award made under Act XIII of 1848. The special appellant relied upon certain proceedings taken by him by way of appeal from the Collector's award. He contended that, inasmuch as the order in those appeal proceedings was within three years of time from the institution of the suit, his suit was not barred. Those proceedings were proceedings ineffectually taken and conducted without due diligence by way of appeal. The appellant having taken certain steps to bring his case before the Commissioner, (the latest of which proceedings, we observe, was more than 3 years before the institution of the suit), fails to prosecute his appeal so as to bring his case to a hearing, and the result was that the appeal was struck off the file by the Commissioner. That was the termination of the proceedings.

We think that such proceedings ineffectually taken and prosecuted without due diligence, and ending in an order by which the appeal was struck off the file, are not in the same position as an appeal duly prosecuted to a hearing and ending in a judgment. The effect of such proceedings seems to us to be nothing. The final award must be taken to be the award of the Collector, and three years must be counted from that date.

The appeal is dismissed with costs.

The 27th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Records (destroyed)—Execution of former decree—Second Suit.

Case No. 3602 of 1863.

Special Appeal from a decision passed by Mr. A. W. Russell, Officiating Judge of Behar, dated the 24th December 1863, affirming a decision passed by Moulvie Nazeerooddeen Mahomed, Principal Sudder Ameen of that District, dated the 30th September 1861.

Mussamut Nuzur Banoo (Defendant) *Appellant,*

versus

Hossein Ali Khan (Plaintiff) *Respondent.*

Moonshee Abbas Ali Khan for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

Where the records of a case are destroyed, the plaintiff may prove his first decree and get the execution of it, but, on his inability to do so, he cannot bring a second suit for the same subject-matter.

Bayley, J.—THIS is a case in which the records being destroyed, the plaintiff brought a second suit for the same subject-matter, for which he had before got a decree. Plaintiff has now got a second decree from the Lower Appellate Court, the Judge of that Court having, in review, altered the judgment of his predecessor and finally decided in plaintiff's favor.

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Against this decision defendant appeals specially, urging—

First.—That the plaintiff was at liberty to prove his first *decree* by secondary evidence, if he could, and get the execution of it; but when he was unable to do this, he was not at liberty to bring a second suit entirely *de novo*. It was urged that to admit plaintiff to sue *de novo*, would be to allow every case to be re-opened from the first establishment of the Courts, and that this would be against all policy of law and opposed to Section 2 Act VIII of 1859, and the Circular Order dated 24th November 1857. It is further pleaded that that Circular Order was never intended by it to allow more than that those whose decrees were destroyed, might, on proof that such decrees had really existed, have them *executed*. We consider this objection valid on the grounds stated, and this would render it unnecessary to go into the second plea, *viz.*, that not only the original sums of principal and interest have been awarded, but also interest *upon* the combined sums. The plea is admitted by the respondent to be good.

The third plea, that one Judge could not review his predecessor's judgment, is untenable. We may note that the decisions of Messrs Justices Levinge and Steer, dated 27th June 1864, Nos. 305-809, have been cited to us, but the cases are not precisely the same. In these cases, records were destroyed *before a decision* on appeal. This is not the state of facts here.

We decree the appeal, and reverse the judgment of the Court below.

The 28th July 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Interest—Evidence—Custom.

Case No 143 of 1864.

Special Appeal from a decision passed by the Judge of the 24-*Pergunnahs, dated the* 18*th November* 1863, *affirming a decision passed by the Sudder Ameen of that District, dated the* 11*th July* 1863.

Mahomed Sumsooddeen (Defendant) *Appellant,*

versus

Moonshee Abdool Huq (Plaintiff) *Respondent.*

Mr. G. Gregory for Appellant.

Baboo Bama Churn Banerjee for Respondent.

Where a note of hand promised re-payment of a loan with interest at 5 per cent., without stating either per mensem or per annum,—HELD that the construction that interest was to be calculated without reference to time was contrary to all practice, and that the ambiguity was one which might fairly be explained by previous transactions between the parties and by custom.

Campbell, J.—PLAINTIFF lent money to defendant on a note of hand promising to re-pay with interest at 5 per cent. The Courts below, on evidence of a previous transaction between these parties and the custom of the country to calculate interest per month, have awarded interest at 5 per cent. per mensem. Appellant argues that the 5 per cent. is neither per mensem nor per annum, but absolutely 5 per cent. without reference to time; that the document is a clear one free from all ambiguity, and that evidence to vary the document should not have been admitted; also that if there was any ambiguity, it was patent, and evidence should not have been admitted. We think that the construction that interest is calculated without reference to time is so contrary to all practice that the document would not be ordinarily read in that light, and that there is an ambiguity regarding the term for which 5 per cent. was to be paid which may fairly be explained by previous transactions between the parties and by custom. We dismiss the appeal with costs.

The 28th July 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Widow—Ejectment.

Case No. 277 of 1864.

Special Appeal from a decision passed by Mr. A. E. Russell, Judge of Moorshedabad, dated the 26*th November* 1863, *affirming a decision passed by Baboo Koonjo Lall Banerjee, Sudder Moonsiff of that District, dated the* 28*th July* 1863.

Chunder Mohun Koondoo and another (Defendants) *Appellants,*

versus

Sonamonee Dassea (Plaintiff) *Respondent.*

Baboo Prosunno Coomar Bose for Appellants.

Baboo Greesh Chunder Ghose for Respondent.

Where a childless Hindoo widow was in possession of a small property belonging to her father's estate and was shown to have no other source of maintenance, although she had no title to inherit, the Court refused

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to allow her to be ousted by an utter stranger to the family who could not show any title whatever to the property.

Kemp, J.—THIS is a peculiar case. The special respondent is admittedly a childless Hindoo widow, and, as such, she could not, under any circumstances, inherit her father's estate. It appears that the estate consists of a house and garden. On the death of the father, a widow and two daughters, one of them a widow, were alive. The widow died, the married daughter with issue took possession of the property, permitting her widowed sister to reside in the house and premises. The married daughter died, as also did her son, leaving the widow occupying the house. The defendants, who are perfect strangers to the family, forcibly turned her out She sued under the provisions of Section 15, Act XIV of 1859, but her suit was dismissed as beyond time, and in that decision it was stated that her witnesses deposed that she had been two years out of possession.

She now sues in the Civil Court to recover possession. The defendants say that they purchased the property from the married sister of the plaintiff, and that, as they are in possession, the plaintiff is bound to prove her title, which she cannot do, inasmuch as she cannot inherit under the Hindoo Law.

Both the Lower Courts have found that the plaintiff was forcibly dispossessed, and that the defendants were unable to prove their purchase. The plaintiff was restored to possession.

In special appeal it is contended that the plaintiff is not the heiress of her father, and that as she had no title, the possession of the defendants must prevail.

We think that the plaintiff has no title to inherit; but we doubt whether the defendant is in a position to question the same, he being an utter stranger to the family. The plaintiff, with or without title, was in possession of this small property, and it is not shewn that she has any other sources of maintenance to which at least she is entitled, wretched as her position may be as a Hindoo widow.

The Courts have found that the defendants ousted her forcibly, and that they can show no title whatever. Under such circumstances, we uphold the decisions of the Lower Courts, and dismiss this special appeal with costs and interest.

The 28th July 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mesne Profits (of Mal Lands fraudulently included with Lakheraj lands resumed and assessed by Government)—Interest — Appeal—Valuation—Section 337 Act VIII of 1859.

Special Appeals from a decision passed by Mr. G. C. Fletcher, Judge of West Burdwan, dated the 26th September 1863, modifying a decision passed by Baboo Banee Madhub Shome, Principal Sudder Ameen of that District, dated the 21st November 1861.

Case No. 3605 of 1863.

Sheero Coomaree Dabee (Defendant) *Appellant,*

versus

Maharaja Mahatab Chund Bahadoor (Plaintiff) *Respondent.*

Baboos Mohendro Lal Shome and *Bama Churn Banerjee* for Appellant.

Mr. R. T. Allan for Respondent.

Case No. 273 of 1864.

Maharajah Mahatab Chund Bahadoor (Plaintiff) *Appellant,*

versus

Sheero Coomaree Dabee and others (Defendants) *Respondents.*

Baboos Chunder Madhub Ghose and *Juggadanund Mookerjee* for Appellant.

Baboos Mohendro Lal Shome and *Bama Churn Banerjee* for Respondents.

In a suit for wasilat in respect of *mál* lands fraudulently included by the lakherajdar with lakheraj lands resumed by Government, and afterwards settled with him,—HELD that the lakherajdar, and not the Government, was liable; and that as the sum claimed was definite and required no further enquiry to ascertain the amount due, interest had been properly awarded from date of suit.

One of several defendants who appeals valuing her appeal only at the sum decreed against her, is not entitled to take advantage of Section 337 Act VIII of 1859, and question the full amount claimed.

Kemp, J.—THERE are two appeals before us, and this decision will govern them both.

It appears that certain lands were resumed by Government. The lakherajdar, anxious to get them on the favorable terms of half jumma, pointed out and obtained the measurement of a large area of mal land belonging to the Raja of Burdwan. The settlement was concluded with the lakherajdar, and he admittedly enjoyed the profits of the land, which, in his case, are the difference

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between the half jumma payable by him to Government and what he collected direct from the ryots.

The Raja appealed to the Special Commissioner, who, finding that the lands were mal and not lakheraj, directed their release to the Raja, with a refund of the collections made by Government to bear interest at 6 per cent. The Government refunded what they had received.

The Raja then sued to recover the difference between the half jumma paid to Government and what the lakherajdar had received from the ryots, estimating those receipts at the other half of the jumma assessed by the Government. The Judge gave him an amended decree.

In appeal on the part of the lakherajdar, it is contended—

1*st*.—That the Raja cannot recover any wasilat from the lakherajdar; that the Government was the wrong-doer; and that all that could be recovered from the Government has been recovered under the decree of the Special Commissioner.

2*nd*.—That the interest on the wasilat should have been awarded from the date of the ascertainment of the same, and not from the date of the suit.

The Raja appeals, urging—

1*st*.—That, as there were three defendants in the Court of first instance, and as the special respondent alone appealed, the Judge was wrong in amending, on her appeal, the decision of the Lower Court *quoad* those defendants who had not appealed.

2*nd*.—That as the Government was an essential party to the suit, the Judge was wrong in making the Raja liable for the costs of Government.

3*rd*.—That, as there was no necessity to ascertain the amount of wasilat, inasmuch as it was claimed on a defined estimate of half of the jumma assessed by the Government on the lands, interest should have been awarded from the commencement of each year of account, and not fron the date of suit.

With reference to the appeal of the lakherajdar, we think that the Judge is clearly right in holding him liable. He is the wrong-doer, and has enjoyed the fruits of his fraud upon the Raja, to which the Government was apparently an innocent party. The Government have done all in their power to atone for the wrong done, by giving up all they received with 6 per cent. interest. The question of interest will be disposed of in the Raja's appeal.

With reference to the Raja's appeal, on the *first* point, we think that the Judge was wrong. The Court of first instance awarded Rs 912-14-6 as against Sheero Coomaree, defendant, and Rs. 630-10 against Radhabullub and Ramjeebun for distinct periods. Ramjeebun and Radhabullub did not appeal. If Sheero Coomaree wished to question the whole claim, she should have appealed, valuing her appeal on the full amount claimed; instead of which she appealed only on a valuation of Rs. 912-14-6. She is therefore not entitled to take advantage of the provisions of Section 337 of the Code. The decree of the Judge must therefore be amended.

On the *second* point we think that it was unnecessary to bring the Government into Court, as they had already satisfied the claim against them. We uphold the Judge's decision as to the Government costs.

In the matter of interest we think that, as the sum was definite and required no further enquiry to ascertain the amount due, interest has been properly awarded from date of suit.

The appeal of the lakherajdar is dismissed with costs and interest, and the appeal of the Raja partially decreed in amendment of the decision of the Lower Court.

The 28th July 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

Putnee—Clause 2 Section 8 Regulation VIII of 1819—Substantial witness—Attesting witness.

Case No. 280 of 1864.*

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs,

* *See* judgment in review, Vol. II, p. 188.

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dated the 18*th November* 1863, *affirming a decision of Baboo Greesh Chunder Ghose, Principal Sudder Ameen of that District, dated the* 18*th May* 1863.

Mohinee Dassee and others (Plaintiffs) *Appellants*,

versus

Juggodumba Dossee and others (Defendants) *Respondents*.

Baboos Anund Chunder Ghosal and *Sham Lall Mitter* for Appellants.

Baboo Sreenath Doss for Respondents.

The expression *substantial witnesses* as used in Clause 2 Section 8 Regulation VIII. 1819, must be taken to mean men who have some stake in the community, men of local influence or importance or respectability. By the words "residing in the neighbourhood," the Regulation does not make it imperative that the attesting witnesses shall be residents of the village, but may be taken to include men living within a short distance of the cutcherry.

Glover J.—The only question before us in this appeal, is whether the notice was duly and legally served in accordance with the provisions of Clause 2 Section 8 Regulation VIII of 1819.

The objections taken to it are threefold :—

1*st.*—It was not attested by three witnesses.

2*nd.*—The witnesses were not substantial persons.

3*rd.*—They were not residents of the village.

The first objection is not borne out by the record. The notice is endorsed with the names of six persons, three of whom are attesting witnesses. It appears from an examination of the papers in this case, that the serving peon went first to the cutcherry, and on the gomastah's refusing to give a receipt, called several of the bystanders together, including the mundul and chowkeedar of the village, and made them endorse the papers with a memorandum showing that the notice had been duly served. In addition to this, there is on the record the evidence of Doorga Churn, one of the appellant's own mohurrirs, who was in the cutcherry at the time, and deposes that the notice was brought there by the serving peon. So that not only is the notice attested by three witnesses, but there are other three whose names are affixed to the document, and who may also fairly be called attesting witnesses. In any case, the provisions of the law in this particular have been observed.

Next as to these witnesses' respectability. The word used in the Regulation is "substantial," meaning of course men who have some stake in the community, men of local influence or importance or respectability. We think that the law has been complied with on this point also. One of the witnesses is the mundul, the head man of the village. Another is the chowkeedar, an official whose attestation is always considered as the best possible in all matters connected with service of notice. The third appears to be a tailor, residing temporarily at the place, but who lives in the neighbourhood. This man is declared to be not a proper witness. We do not see why the man is not to be considered competent to attest the serving of notice. He appears to be a respectable man, though not a rich one; and besides, the phrase "substantial," on which special appellant lays so much stress, must be taken comparatively. In a small village the measure of a "substantial" witness will of course be much lower than in a place of importance.

With regard to the third objection, we observe that the Regulation does not make it imperative that the attesting witnesses shall be residents of the village. The words used are "residing in the neighbourhood," and there can be no doubt that the "durzee" answered to that description, as his house was within a short distance of the cutcherry.

It remains, then, that the service of notice has been found by the evidence of seven witnesses, three of whom attested the document itself, whilst of the rest one was the appellant's own mohurrir. The object of the law was, of course, that defaulters should have full and timely notice of the zemindar's intention to sell, and this object has, we think, been fully carried out in the present case.

We therefore dismiss the appeal with costs.

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The 28th July 1864.

Present :

The Hon'ble C. Steer and E. P. Levinge,

Judges.

Secret Transfers of Family Property.

Case No. 536 of 1863.

Regular Appeal from a decision passed by Mr. E. F. Lautour, Judge of Patna, dated the 30th July 1863.

Mussamut Ghusseetun and others (Defendants) *Appellants,*

versus

Maharanee Inderjeet Koonwar (Plaintiff) *Respondent.*

Moulvie Aftabooddeen Mahomed for Appellants.

Messrs. R. T. Allan and *R. E. Twidale*, and *Moonshee Ameer Ali* for Respondent.

The managing member of a family cannot pass off the property of the debtor, his father, to one member of the family, unknown to the creditor, and thus protect the estate by placing it in the hands of another member of the family.

Levinge, J.—THE appellant was the defendant below. The plaintiff has sued to obtain a declaration from the Court that certain alienations made of the property of Hossein Khan, after his death, might be set aside, and that the decree she obtained against the brothers of the alienor as heirs of Hossein Khan, deceased, might be satisfied out of the proceeds of the property so alienated.

The plaintiff's case is that she obtained her original decree on the 30th December 1856, for rent due by Hossein in his lifetime, amounting to Rs. 1,65,009, against the sons of Hossein by his first wife, alleging that the property of Hossein was vested in them, Talub Ali, being the eldest son and manager of the estate. Ali Hossein, the son by the 2nd marriage, was no party to that suit.

It appears that by an alleged arrangement between Talub and Ali, it is said, the property, the subject of this suit, was given over to Ali and his mother Moneerun. This property is also admitted to have been in the possession of Hossein up to his death. It is not shown that the plaintiff had any knowledge of this alleged transfer, which has been, in legal proceedings, found to be fictitious. The possession, however, of Ali Khan does not seem to have been disputed. After the institution of the suit by plaintiff against Talub and the other defendants, she caused, as she alleges, the estates of Hossein, which came to their hands, to be attached. It is disputed by the defendants that the property in this suit was attached. The date of the alleged attachment was in 1852, shortly after date of suit. We are satisfied on the evidence on the record that the Lower Court has come to a correct conclusion as to the fact of the attachment, and it is hardly necessary for us to notice the argument of the pleader for the appellant that the Court is bound to find that each portion of the estate was attached, when we find that there is positive and distinct evidence of the attachment of one of the principal mouzahs included in this suit, and abundance of circumstances leading the Court to the conclusion that the attachment was in all respects complete.

It appears that after attachment and under a fictitious title, the defendant Ali sold, as alleged, the property involved in the present suit to the defendant Ghusseetun. Now, we do not stop here to try the issue, whether Ghusseetun and Ali Hossein's mother, Moneerun, are one and the same person. We greatly doubt the genuineness of that sale, inasmuch as the consideration, Rs. 15,000, is made up of an alleged purchase of a decree against Ali and his brothers, and the residue, Rs. 3,300, in cash. It was very easy to get up this decree by allowing a judgment to be passed and then have it assigned as the foundation for establishing the *bona fides* of the consideration of the deed of sale; but being satisfied that this property was in fact attached, we hold that the plaintiff is entitled to succeed.

It is argued that, even admitting the attachment, it is only good as against the share of the defendants in the original suits; but we cannot accede to that doctrine or hold that the heir and managing member of the family can pass off the property of the debtor, his father, to one member of a family unknown to the creditor, and thus protect the estate by placing it in the hands of another

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member of the same family. We dismiss this appeal with costs.

Mr. Gregory for appellant Sree Chand, claims under Section 348, Act VIII of 1859, to be heard in dissatisfaction of the order for costs, but inasmuch as Sree Chand was a necessary party and made a hostile defence, we cannot say that the Judge was not justified in making him responsible for his own costs; and we observe that he continues his hostility to the plaintiff's claim in his grounds of objection. We therefore dismiss his appeal.

The 28th July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Section 230 Act VIII of 1859.

Regular Appeals from a decision passed by the Judge of Tirhoot, dated the 16th September 1863.

Case No. 75 of 1864.

Eusuf Ali Khan and another (Plaintiffs, Objectors) *Appellants,*

versus

Shib Shunkur Suhaye (Plaintiff, Decree-holder) and others (Defendants) *Respondents.*

Baboo Kalee Kishen Sein for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondents.

Case No. 76 of 1864.

Kurim Buksh and another (Objectors) *Appellants,*

versus

Shib Shunkur Suhaye (Plaintiff, Decree-holder) and another (Defendant) *Respondents.*

Baboo Kalee Kishen Sein for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondents.

An objector who does not claim to be in possession "on his own account or on account of some person other than the defendant," but whose sole ground of intervention is that he holds a *bonâ fide* title derived from the defendant, is not entitled to be heard under Section 230 Act VIII of 1859.

Seton-Karr, J.—These appeals were filed in the Miscellaneous Department, but were converted into regular appeals by an order of a single Judge of this Court dated the 25th of February last.

The facts are very simple. The respondent, decree-holder, took out execution against certain property as belonging to his judgment-debtor, Gobind Suhaye. The present appellant then filed an application under Section 230 of the Code of Procedure, disputing the right of the decree-holder and alleging that he was in possession of the property attached under two zur-i-peshgee leases derived from the judgment-debtor, and that he had not been a party to the original decision.

The Judge treated the case under the Section quoted as a regular suit, making the objector plaintiff, and the decree-holder defendant, and then found that the latter pleaded that the title put forth by the objector commenced after the institution of the former suit, under which the judgment had been obtained against the property, and urged that it was not valid under Section 223.

On this, the Judge dismissed both the suits of the objector, which were brought on similar grounds, holding that his pleas disclosed a new tenure, and that under Section 323 he was not entitled to have his claim registered under Section 330.

In appeal No. 75, we find that the zur-i-peshgee lease, which we have read, expressly recites that a new loan had been made by the objector to the defendant in the former suit, and that a fresh lease had been created by the latter in consequence. The loan, it is stated, was required to carry on an appeal then pending, and to meet certain other expenses.

Nothing to our thinking can be plainer than this. The transaction was an entirely

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new transaction, whatever might have been the old dealings between the parties. A new consideration was given, and the objector, claiming to hold his lease on such terms, obviously is a person contemplated in Section 223 as "claiming under a title created by the defendant subsequent to the institution of the suit," and, as such, must vacate possession in favor of the decree-holder under that very Section.

In the Appeal No. 76, the words of the zur-i-peshgee lease are not quite so clear, although we gather that the loan in this case was still a fresh transaction. But the legal ground on which both these cases must be treated is, that under the terms of Section 230, the objector has no right to be even heard at all. The objector, in order to claim a hearing under that Section, must contend that the property was "in his possession on his own account, or on account of some person other than the defendant," and this he does not pretend to do. His sole ground of intervention is that he holds a *bonâ fide* title derived from the defendant. Such a title was not contemplated at all in the Section last quoted and has no claim to be considered under it.

The claim is strictly one that is contemplated in Section 223, but is thereby declared of no force against the decree, and as such it had no right to a formal consideration as a regular suit under Section 230.

In this view, holding that the Judge was perfectly right in his conclusion, though somewhat incorrect in his mode of treating the application, we confirm the decision and dismiss both appeals with costs.

The 29th July 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sale by Hindoo widow—Necessity—Application of purchase-money.

Case No. 151 of 1864.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of the 24 *Pergunnahs, dated the* 12*th September* 1863, *affirming a decision passed by the Sudder Ameen of that District, dated the* 28*th February* 1863.

Ram Gopal Ghose and others (Defendants) *Appellants,*

versus

Bullodeb Bose (Plaintiff) and another (Defendant) *Respondents.*

Baboos Mohesh Chunder Bose and *Kedarnath Muzoomdar* for Appellants.

Mr. R. T. Allan and *Baboo Kishen Kishore Ghose* for Respondents.

Where there is no doubt as to the necessity for a sale by a Hindoo widow and the vendee pays a fair price for the property sold and acts throughout *bonâ fide*, the mere fact of only two-thirds of the purchase-money having been paid to creditors, would not invalidate his conveyance, he not being bound to see to the application of his money.

Glover, J.—This was a suit on the part of the plaintiff (special respondent) to recover possession of a certain portion (a 4 annas share) of an estate purchased from Sutto Bhama Dossee, a Hindoo childless widow. The other parties to the suit, who are the purchasers of the rights and interests of Sutto Bhama's deceased husband, alleged that the sale by the widow was contrary to the provisions of Hindoo Law, and therefore illegal, no necessity for the alienation having been shewn.

The Lower Appellate Court decided that the necessity was proved, and upheld the conveyance to the special respondent.

The only point urged before us in special appeal is the general issue, special appellant contending that the alienation was not necessary and therefore not legal.

We see no reason to interfere in this case. It appears from the record that the widow had, before the suit which she brought *in formâ pauperis*, been concerned in other cases relating to her late husband's estate, and for the vakeel's fees due on one of these Government had ordered the estate to be put up for sale. To stay this sale, and to raise money for other needs, the widow conveyed a 4 annas share of the property to the special

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respondent for rupees 3,000, which, as the jumma was rupees 214, was not an improper price for it.

It appears further from the documents filed that the widow paid other sums on account of her husband. Special appellant indeed alleges that, even taking special respondent's account for granted, the payments made do not amount to rupees 2,000, whilst the widow sold land valued at rupees 3,000; but this, even if it be admitted, will not affect the special respondent's claim. It has been ruled in many cases, and notably in that of Honooman Pershad Pandey *versus* Mussamut Babooee Mungraj Kooeree, decided by the Privy Council on the 8th July 1856 (*Vide* Moore's Reports, Volume 6, page 393) that though "a lender is bound to enquire into the necessities of a loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the party is acting for the benefit of the estate, if he does enquire and acts honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of his charge which renders him bound to see to the application of his money."

Now, in this case, there can be no doubt of the necessity of raising money by the widow, inasmuch as the estate was actually advertised for sale on account of the fees mentioned above. And the intending purchaser, knowing this as a matter of public notoriety, must be considered to have acted in the spirit of the Privy Council decision and have satisfied himself, as well as he could, that the vendor was acting for the benefit of the estate. He paid a fair price for the property and acted throughout *bonâ fide*, and the mere fact (if fact it be) that only two-thirds of the purchase-money was paid to creditors, would not invalidate his conveyance, he not being bound to see to the application of his money.

We, therefore, dismiss this appeal with costs.

The 30th July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Special Appeal—Rejection of Appeal —Amendment of Appeal.

Case No. 354 of 1864.

Special Appeal from a decision passed by the Judge of Patna, dated the 31st December 1862, affirming a decision passed by the Sudder Ameen of that District, dated the 27th November 1862.

Bussunt Singh (Defendant) *Appellant,*

versus

Zalem Singh and others (Plaintiffs) *Respondents.*

Mr. A. F. Lingham for Appellant.

Mr. C. Gregory, Baboo Otool Chunder Mookerjee, and *Moulvie Syud Murhumut Hossein* for Respondents.

The High Court refused on special appeal to convert an order rejecting an appeal into one returning it for amendment.

Seton-Karr, J.—It is first contended by the respondent that this special appeal cannot be heard at all, inasmuch as it has not been presented in due time. But after referring to the various miscellaneous orders of July 1863, and of January and March 1864, of this Court, we are quite satisfied that the appeal has been legally admitted, and we proceed to hear it for what it is worth.

We perceive that the Judge in the Lower Appellate Court rejected the appeal as unnecessary prolix, but allowed the appellant to file a separate appeal on fresh stamp paper. In this the Judge was legally correct under Sections 334 and 336. The appeal was, we perceive, taken up with argument and narrative, and was unreasonably lengthy, and for his order, the Judge had the law entirely on his side.

We are, however, urged to consider that the Judge might have returned the appeal for amendment, and that the appellant's is a hard case. But the Judge was within the law

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when he exercised his discretion and did not return the appeal, but rejected it for good reasons, and we have to take care that such hard cases do not lead Courts to give sanction to bad law.

It was the business of the appellant to have complied with the Judge's order first, and so to have put himself right with the law with the directions of which he had not complied. And we cannot now, sitting on special appeal, convert an order to reject an appeal into one to return it for amendment.

Finding, therefore, no legal defect in the proceedings of the Lower Court, we can only dismiss this appeal with costs.

The 30th July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Execution of decree—Sale.

Case No. 359 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 26th November 1863, *affirming a decision passed by the Sudder Ameen of that District, dated the 15th May* 1863.

Mr. T. J. Kenny and others (Defendants) *Appellants,*

versus

Gopee Soonduree Dassee (Plaintiff) *Respondent.*

Mr. R. T. Allan and *Baboo Shib Chunder Muzoomdar* for Appellants.

Baboos Poorno Chunder Mookerjee and *Gopal Lal Mitter* for Respondent.

The holder of three decrees for rent against a jote took out execution and attached the jote for two of them. The purchaser of the tenure disputed the amount due on two of the decrees for which the tenure had been attached, but paid nothing on account of the third decree. HELD that the tenure bought by the purchaser was liable for all the three decrees.

Seton-Karr, J.—THE facts disclosed in this case are as follows:—

There were three decrees for rent held by the special appellant against a certain *jote.* The special appellant took out execution and attached the jote for two of them. The plaintiff in this action, who had bought the tenure against which the decrees had been obtained, deposited the amount due on two of the decrees for which the tenure had been attached, but did not pay anything on account of the third decree.

The question raised by this state of things, is whether the private sale of the plaintiff is good against the third decree, or whether the tenure should be sold on account thereof, though not attached by the decree-holder.

After hearing the pleaders fully on both sides, we are of opinion that the tenure bought by the plaintiff must be considered liable for all the three decrees held by the special appellant. The tenure may be fairly considered to be burdened with, and hypothecated for, the rents due on it. The plaintiff, from the mere accident of the zemindar's failure to attach the jote for the third decree, cannot be allowed to purchase and hold the tenure to the prejudice of the zemindar to whom rent is due. Accepting, then, the conclusion as to the facts drawn by the Lower Court, we think that the tenure should have been allowed to go to sale for its arrears of rent; and reversing the decisions of the Lower Courts, we decree this appeal with costs.

The 30th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Registration.

Case No. 2779 of 1863.

Special Appeal from a decision passed by Moulvie Naseerooddeen Mahomed, Principal Sudder Ameen of Cuttack, dated the 30th June 1863, *reversing a decision passed by Baboo Prosunno Chunder Gangooly, Moonsiff of Kendraparah, dated the 25th July* 1862.

Khettur Balsee (Defendant) *Appellant,*

versus

Gour Hurree (Plaintiff) and others (Defendants) *Respondents.*

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Baboo Poorno Chunder Mookerjee for Appellant.

Mr. R. T. Allan and *Baboo Nil Madhub Sein* for Respondents.

The rule giving a registered document preference over an unregistered one, does not apply to deeds of different descriptions.

Jackson, J.—In this suit a mortgagee has obtained possession of a certain estate which was mortgaged to him under a deed of conditional sale, upon which he had taken the usual foreclosure proceedings and which he had thereby rendered *absolute*. The defendant, a private purchaser from the mortgagor, contested the plaintiff's title, on the ground that his purchase had been *registered*, while the plaintiff's kutkubala had *not* been registered. But the Judge, on appeal, held that the defendant's deed had been executed *in collusion* with the vendors, and rejected the defendant's claims.

On special appeal, the priority of the defendant's title on the ground of registry, is again pressed; but we are of opinion that the law does not apply to deeds of different descriptions. And under any circumstances, as the Judge has found the defendant's deed to be *collusive*, *i. e.* fraudulent as against the mortgagee, it cannot now, on special appeal, be considered to confer any title *against him*.

It is then said that the defendant, as representative of the mortgagor, was entitled to notice of the foreclosure. No such ground was taken on special appeal. The plaintiff had, as the Judge says, full notice of the mortgage and full opportunity to pay it off, had he desired to do so. He neglected to pay the money, and must take the consequences.

The special appeal is dismissed with costs.

The 30th July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Oral evidence (to set aside absolute deed of sale).

Case No. 357 of 1864.

Special Appeal from a decision passed by Baboo Gunja Churn Shome, Principal Sudder Ameen of Dacca, dated the 28th November 1863, modifying a decision passed by Moonshee Abdool Khalick, Moonsiff of that District, dated the 18th December 1862.

Jugobundhoo Mookerjee and others (Defendants) *Appellants,*

versus

Luckheessuree Debia (Plaintiff) *Respondent.*

Baboo Mohesh Chunder Banerjee for Appellants.

Baboo Sreenath Banerjee for Respondent.

Oral evidence is not admissible to set aside a deed of sale which, by its terms, is clearly absolute.

Loch, J.—Property was sold under a deed of sale by the husband of the plaintiff so far back as 1243, and possession has been held without dispute for 25 years by the vendee. Plaintiff, widow of the vendor, now seeks to set aside the sale, on the allegation that it was conditional, and witnesses have been called to prove that such was its nature.

Defendant pleads that the sale was absolute; but the Lower Courts have set aside the deed and declared the sale to have been only conditional.

We think it is highly injurious to the security of property if solemn deeds of sale are to be set aside after the lapse of 25 years' possession of the vendee, by any construction that either the witnesses to the deed itself or other witnesses may choose to put upon it. At the time of making a deed, the vendor has the opportunity of protecting his own interests, either by declaring the sale to be conditional in the body of the deed itself, or by taking a separate deed executed by the vendee at the time of sale, covenanting to restore the property under certain conditions. If the vendor neglect to take such precautions, we think the Courts of Law should not admit oral evidence to set aside a deed of sale, which, by its terms, is clearly absolute. Under this view of the case, we decree the appeal and set aside the decision of the Lower Court, and dismiss the plaintiff's suit with all costs.

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RULINGS UNDER ACT X OF 1859.

The 4th January 1864.

Present:

The Hon'ble F. B. Kemp and the Hon'ble Shumboonauth Pundit, *Judges.*

Rights of occupancy (what ryots entitled to).

Case No. 448 of 1862.

Regular Appeal from a decision passed by Mr. Rivers Thompson, Judge of Nuddea, dated the 27th June 1862.

Bindrabund Chunder Chowdree (Plaintiff) *Appellant,*

versus

Issur Chunder Biswas and others (Defendants) *Respondents.*

Baboo Mohendrololl Shome for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Suit laid at rupees 5,770-9-12.

Only those tenants who cultivate their lands or sublet them to actual cultivators of the soil are entitled to rights of occupancy under Section 6 Act X of 1859.

Kemp, J.—THIS was a suit on the part of a putneedar for direct or khas possession of 721 beegahs 6½ cottahs of land situated in Mouzah Doorgapore, in the zemindaree of the Rajah of Nuddea. The plaintiff derives his title from the Rajah of Nuddea under a putnee lease dated the 29th Magh 1263 B. S. The defendants' guardians, lessees of the said village, while they admit the putnee title of the plaintiff, contend that they have acquired a right of occupancy as jotedars over the lands in dispute, and that the plaintiff is therefore not entitled to be put in khas possession of the same.

It is admitted that the defendants held as lessees for nearly forty years on successive leases which were renewed as each term expired. It is also admitted that the plaintiff has acquired the putnee right over the whole village from 1263 B. S., and that the last lease of the defendants expired in 1266 B. S. and was not renewed. The Judge raised one issue, to wit, "whether the defendants held as jotedars or not?" The Judge was of opinion that the defendants had satisfactorily proved their jotedaree title under two pottahs granted by the wife of the Rajah of Nuddea; and that this title existed independent of any temporary title as lessees. The Judge further remarks that the jotedaree pottahs under which the defendants claim a right of occupancy appear to have been filed in a rent suit before the creation even of the plaintiff's putnee, and therefore are reliable documents. He further held that the plaintiff had no power to interfere with the rights of occupancy established in favor of the defendants over the 721 beegahs 6½ cottahs in dispute. But at the same time he was of opinion that the grantor of the pottahs to the defendants, or the Ranee, was not competent to give a pottah at a fixed rate of rent; and with this reservation as to the power of the plaintiff to enhance the rent of the defendants' "jote," if so advised, the suit was dismissed with costs, &c.

In appeal it is argued that the pottahs under which the defendants claim are spurious; that, admitting them to be genuine, the grantor, the Ranee, was incompetent to grant them.

In this appeal we have to consider—

First.—Whether the pottahs, under which the defendants profess to derive a jotedaree title, are *bonâ fide* and valid, as granted by competent authority.

Second.—Whether, setting aside the pottahs, the defendants have acquired such a right of occupancy as to entitle them to hold the disputed lands as long as they pay a fair and equitable rate of rent for the same.

On the *first* point we are of opinion, after careful consideration, that the pottahs under which the defendants allege they have acquired a jotedaree title, independent of the temporary interest in the parent village which they acquired in their capacity of lessees for a term, are neither *bonâ fide* nor valid. The pottahs in question are dated respectively the 17th Bysack 1252 B. S. and the 19th Phalgoon 1258 B. S. We doubt very much whether these pottahs were really

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granted by the Ranee. We observe that the last figure in the year has been tampered with in the pottah professing to be dated in 1258 B. S. This much, however, is very clear that she had no title to grant jotedaree pottahs or any other leases for a period beyond 10 years; and, therefore, admitting these pottahs to be *bonâ fide*, they could not operate for a period beyond what the grantor was competent to give. In this case, where the defendants admittedly held as lessees, and seek to carve out a subordinate and independent tenure beyond the scope of their temporary title as lessees, much stronger proof will be required at their hands to substantiate their title than we should expect at the hands of a mere ryot, and we are not satisfied either with the amount or quality of the proofs adduced by the defendants. Beyond one dakillah for Rs. 15, which wears a very suspicious appearance, there is no proof of payment of rent as jotedar, nor is there any confirmation by the Ranee, the alleged grantor of the defendants' jotedaree title, between the year 1230 B. S., when the Ranee's temporary title accrued, and the year 1252 B. S., the date of the first alleged pottah to defendants, though it is alleged that the jotedaree title existed from the period of the Decennial Settlement. The decision in a rent case which has been filed appears to have been obtained for the purpose of being used in evidence in this suit, to prop up the alleged jotedaree title. Such decisions *ex parte*, or in confession of judgment, can always be obtained for such purposes, and are, for the most part, worthless as evidence of title or possession. Again, at the time the defendants took a farming lease of the whole village of Doorgapore, there was no mention made in the lease of this exclusive subordinate jote of 700 beegahs and upwards, which, if it really existed, there would most assuredly have been, with a distinct reservation protecting this alleged subordinate holding.

On the *second* point we are of opinion that these defendants are not of the class of ryots contemplated in Section 6 of Act X of 1859. Their pottah is spurious, and that they ever cultivated these lands or sub-let them to other actual cultivators of the soil (thus keeping alive their rights of occupancy under the above quoted Section) is not proved, and is, indeed, altogether improbable. Had they cultivated these lands, they would have been able to show us continued and well-supported payments of rent; but this they have wholly failed to do. Being, therefore, of opinion that this is a fraudulent attempt on the part of the defendants, whose farming lease has lapsed, to fall back upon a right of occupancy (as cultivating ryots, and it is only such that the law favors) which never existed, and which, perhaps, the Section above quoted suggested to them for the first time, we reverse the decision of the Lower Court, and decree this appeal with costs and interest payable by the respondents.

The 5th January 1864.

Present:

The Hon'ble C. Steer and L. S. Jackson, *Judges.*

Kubooleut—Enhancement — Notice—Rights of Occupancy.

Cases Nos. 2960 and 2961 of 1862 under Act X of 1859.

Special Appeals from decisions passed by Mr. F. A. Elphinstone Dalrymple, Additional Judge of Chittagong, dated the 15th September 1862, *affirming decisions of Baboo Goluck Chunder Canoongo Roy Bahadoor, Deputy Collector of that District, dated the 27th August* 1861.

Suffer Ali and others, *Appellants,*

versus

Futteh Ally Nazir and others, *Respondents.*

Baboos Mutty Loll Mookerjee and *Kali Mohun Doss* for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

In an action for a kubooleut, notice is not essential; and where a ryot does not claim to have a right of occupancy, it is not necessary for the landlord to state on what ground he claims a kubooleut at an enhanced rate.

Steer, J.—THESE are cross-suits.

In No. 2960 the plaintiff sues to obtain a kubooleut at an enhanced rate.

The defendant (the plaintiff in No. 2961) pleaded a former decree in bar of the claim of enhancement.

The Judge, without noticing the decision relied upon by the defendant, records that there is no proof that the land is held istemraree, and declares the plaintiff entitled to obtain from the defendant a kubooleut for Rs. 2-12 per kanee.

Three objections have been raised in special appeal against this decision: 1*st*, that the decision relied upon is a bar; 2*nd*, that there was no notice; 3*rd*, that the plaintiff was bound to state the ground on

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which he claimed an enhancement of rent and to prove it.

We have read the decision and find that there was no question in the case whether the defendant's rent could be enhanced, the suit being merely for possession and wassilat. It was found that he held on a settlement from the zemindar at a rate of one rupee per beegah. But the decision did not, and could not, rule that the rent could not hereafter be enhanced.

In respect to the other two objections, notice in an action for a kubooleut is not essential; and as the defendant did not claim to be a ryot having right of occupancy, it was not necessary that the plaintiff should state on what grounds he claimed a kubooleut at enhanced rate.

In the other case the ryot was the plaintiff claiming to hold at one rupee a beegah, at which rate he demanded a pottah. As in the other case for a kubooleut, he has been found not to hold at a fixed rate, and that he is liable to a rent of Rs. 2-12, his suit was properly dismissed by the Lower Court.

There being therefore no grounds for the special appeals preferred in these cases, we dismiss them with costs.

The 8th January 1864.

Present:

The Hon'ble W. Morgan and Shumboonauth Pundit, *Judges.*

Jurisdiction—Possession and Mesne Profits—Splitting.

Case No. 787 of 1863.

Special Appeal from a decision passed by Mr. W. Wright, Principal Sudder Ameen of Rajshahye, dated the 16th January 1863, affirming a decision of Baboo Bungsee Dhur Sein, Moonsiff of that District, dated the 23rd May 1862.

Ramlochun Doss (Plaintiff) *Appellant,*

versus

Mungul Sheikh and others (Defendants) *Respondents.*

Baboos Debendronarain Bose and *Greesh Chunder Ghose* for Appellant.

No one for Respondents.

A person having a right to sue for possession and wassilat is not obliged to divide his causes of action so as to bring one suit for possession under Clause 6 Section 23 Act X of 1859 in the Collector's Court, and another for wassilat in the Civil Court, but may bring one suit for both in the Civil Court.

Morgan, J.—THE suit is for the possession of land alleged by the plaintiff to belong to his jote (from which the defendant has dispossessed him), and also for wassilat. The defendant pleads a pottah from the zemindar granted to him after the plaintiff had relinquished the land. The Lower Appellate Court has decided that the Civil Court has no jurisdiction in such a suit, which ought to be tried by the Collector according to the provisions of Clause 6 Section 23 Act X of 1859. Assuming that the suit is, in part, a suit by a ryot under that Clause, it extends also to other matters in respect of which the Collector's Court has no jurisdiction, for it includes a claim for wassilat which, according to a decision of this Court, dated the 13th February 1863 in Special Appeal No. 1768 of 1861, cannot be determined by a Collector. We think that the plaintiff, having a right to sue for wassilat in the Civil Court, was not bound to exclude from his suit the other portion of his claim, and thereby to divide his causes of action and make them the subjects of different suits.

The judgment of the Lower Appellate Court must be set aside, and the suit remanded to that Court for trial.

The 8th January 1864.

Present:

The Hon'ble C. Steer and L. S. Jackson, *Judges.*

Jurisdiction—Assignment of rent.

Case No. 172 of 1863.

Regular Appeal from a decision passed by Baboo Ramtaruck Roy Bahadoor, Officiating Principal Sudder Ameen of Rungpore, dated the 26th December 1862.

Kishen Koommar Mitter and others (Defendants) *Appellants,*

versus

Mohesh Chunder Bannerjee (Plaintiff) *Respondent.*

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Baboos Kishen Kishore Ghose and *Baney Madhub Banerjee* for Appellants.

Baboos Onnocool Chunder Mookerjee and *Huro Kally Ghose* for Respondent.

Suit laid at rupees 40,770-6.

A suit for arrears due under an assignment of rent is a suit to recover arrears of rent, and, as such, is only cognizable under Clause 4 Section 23 Act X of 1859 by the Revenue Courts.

Steer, J.—THE plaintiff holds a putnee under the zemindar from whom he received an assignment upon the defendant, his farmer, to pay to the plaintiff 15,000 rupees out of his annual rent payable to the zemindar. The plaintiff accordingly sues the defendant for arrears due to him under the assignment.

Clearly the sum demanded from the defendant is the amount of his rents due to his zemindar. This is clearly therefore a suit to recover arrears of rent which is only cognizable under Clause 4 Section 23 Act X of 1859 by the Revenue Courts. *As rents*, the whole sum may not be due to the plaintiff, but they are due to the zemindar who assigns them to him. If the zemindar could not sue the defendant, his farmer, for the rents due to him except in the Revenue Courts, neither can his assignee.

We hold, therefore, in conformity with the decision of this Court of the 4th December 1862 (*vide* page 574 of Hay's Reports) that the suit was wrongly tried in the Civil Court, and we accordingly reverse the decision of the Principal Sudder Ameen as passed without jurisdiction, with costs against the respondent.

The 12th January 1864.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Jurisdiction—Mokururee title.

Case No. 159 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 23rd December 1862.

Lalla Gokool Pershad and others (Defendants) *Appellants,*

versus

Rajah Rajendur Kishore Singh (Plaintiff) *Respondent.*

Baboos Unnoda Pershaud Banerjee and *Dwarkanath Mitter* for Appellants.

Moonshee Ameer Ali and *Baboos Hem Chunder Banerjee* and *Kissen Succa Mookerjee* for Respondent.

Suit laid at rupees 12, 672-7.

A and *B*, alleging themselves to be the holders of a mokururee tenure within *C's* zemindary, and to have been ousted by *C*, brought a suit under Section 23 Act X of 1859 and recovered possession, without any enquiry having taken place into the validity of their title to hold as mokururedars. *C* now sues in the Civil Court to try the question of *A* and *B's* mokururee title. HELD that the suit was cognizable in the Civil Court.

Jackson, J.—THE defendants allege that they are the holders of a mokururee tenure within the zemindary of the plaintiff, while the plaintiff alleges that they are tenants under a temporary lease the term of which has expired. The plaintiff, of his own accord, dispossessed the defendants on what he termed the expiry of their lease. The defendants sued under Section 23 Act X of 1859, and recovered possession, the Judge on appeal recording that the zemindar's allegation of a temporary lease was false, and the kubooleut produced by him a forgery, and that the defendants were in possession as mokururedars. The Judge, therefore, restored defendants to possession, but he also recorded that he had not enquired into the validity of their title to hold as mokururedars.

The plaintiff now brings this regular suit to try the question of the defendants' mokururee title, and to oust them from the land and obtain possession of it.

The Lower Court has decreed the claim on the ground that defendants have not furnished any evidence of the validity of their mokururee title.

On appeal defendants' pleader, Baboo Dwarkanath Mitter, has urged that the suit is not cognizable by the Civil Courts; that the validity of the defendants' title was an issue which should have been raised and decided in the case under Act X of 1859; and that, if it was not then tried, the plaintiff should have appealed on that point, but that he cannot bring a regular suit to try the question.

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We see no bar by the law to the hearing of the suit on the merits of the defendants' titles. The Judge might, in the Act X suit, have gone into the question of defendants' title. But he found that there was sufficient evidence upon which to declare the defendants entitled to recover possession without determining the question of title, and he declared that he did not adjudicate that question. The plaintiff cannot now sue before the Collector for a decision on the defendants' title. He is entitled to have the question tried, as he disputes that title. The Civil Courts have jurisdiction in the case, and his suit in those Courts is, therefore, correctly preferred.

It is then urged that the defendants cited the plaintiff, Rajah of Bettiah, and his brother as their witnesses; but that the Lower Court did not have the Rajah examined in their presence, and refused to issue a proclamation to require the attendance of his brother, when the peon reported that a summons could not be served upon him. We are not satisfied that the defendants showed sufficient ground for their application to summon the Rajah as a witness under Section 162 Act VIII of 1859; or that they proved that the evidence of the Rajah's brother was material under Section 159 of the above Act, and we do not, therefore, consider that these objections are any ground for interference with the Lower Court's decision.

The appellant's pleader admits that the record contains no evidence of defendants' title. He states that the evidence is filed in the Act X record, which has not been sent up. However this may be, the appellant having failed to prove his title before us, we can only confirm the Principal Sudder Ameen's judgment, and dismiss the appeal with costs.

The 15th January 1864.

Present:

The Hon'ble G. Loch and E. Jackson,

Judges.

Limitation—Section 32 Act X of 1859—Construction.

Case No. 452 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. J. C. Dodgson, Judge of Mymensingh, dated the 3rd December 1862, affirming a decision of the Deputy Collector of that District, dated the 4th September 1862.

Mr. Moran (Defendant) *Appellant,*

versus

Bindoobashinee Debea, widow of Pran Goshain (Plaintiff) *Respondent.*

Baboos Tarucknath Sen and *Khetternath Bose* for Appellant.

Baboo Kishen Dyal Roy for Respondent.

The words "passing of this Act" in Section 32 Act X of 1859 refer to the 29th April 1859, the date on which the Act received the Governor-General's assent. For all rents then due, suit should be brought within three years from that date, or before the 29th April 1862.

Loch, J.—PLAINTIFF gave a lease for certain lands to the defendant, and brought an action for arrears of rent extending from Assin 1263 to Cheyt 1267. Defendant pleaded limitation under Section 32 Act X of 1859; and that, as the lease was given to him in satisfaction of a loan of rupees 500, it was agreed that he should not be liable for rent. The Lower Appellate Court held that the suit was not barred by limitation, and that there was nothing on the record to lead the Court to suppose that the lease was given merely to liquidate the bond given by plaintiff, and that the pottah made no mention of it; and a decree was given for plaintiff.

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In special appeal, the pleas taken are limitation, and that the Judge has passed no opinion as to the oral evidence; that the lease was merely a usufructuary mortgage, and that oral evidence might be adduced to prove such to be the purport of the instrument, though, on the face of it, no such provision appeared.

On the point of limitation we hold, as ruled lately by a Full Bench of this Court, that the words "passing of this Act," in Section 32 Act X of 1859, refer to the date on which that law received the sanction of the Governor-General, *viz.*, 29th April 1859, corresponding with 7th Bysack 1266; and that, for all rents then due, a suit should have been brought within three years, or before 29th April 1862. But the present suit was not instituted till 2nd July 1862, and consequently plaintiff's claim to rent for the period previous to the passing of the Act is barred.

On the second point, we see no sufficient grounds for interfering with the decision of the Lower Court. We cannot suppose that the Judge decided the case without looking into the evidence. He might, it is true, have given a distinct opinion as to the value of the oral evidence, but we see no good that is to be gained by sending back the case for that purpose. The lease and the bond make no mention of such terms as are pleaded by defendant, and the Judge does not accept the other evidence.

Under these circumstances we modify the Judge's order in regard to the rents as above, and give costs in proportion.

The 26th January 1864.

Present:

The Hon'ble G. Loch and J. P. Norman,

Judges.

Rent—Purchaser of zemindary sold in execution of decree—Limitation.

Case No. 32 of 1863.

Regular Appeal from a decision of the Deputy Collector of Rajshahye, dated the 23rd December 1862.

The Collector of Rajshahye (Defendant) *Appellant,*

versus

Hursoondery Debea (Plaintiff) *Respondent.*

Baboo Kissen Kishore Ghose for Appellant.

Messrs. H. Stainforth and *G. Plowden* and *Baboos Obhoy Churn Bose* and *Baney Madhub Banerjee* for Respondent.

The purchaser of a zemindary sold in execution of a decree is entitled to all the rents accruing due from the date of his purchase; and if the tenants or ryots, after having had notice of his title, choose to continue to pay their rents to, or for the use of, the former proprietor, they do so at their peril, and cannot plead such payments in answer to a suit for rent by the new owner.

Where the plea of limitation was urged for the first time orally in appeal, it was not allowed.

Norman, J.—This is a suit for rupees 17,449, arrears of rent and interest in respect of a putnee lease, at an annual jumma of rupees 2,400 from October 1851 to April 1854, on the allegation that the plaintiff became entitled to the zemindary under a purchase at a sale by auction by the Sheriff of the Supreme Court, in execution of a decree against the former proprietor on 31st July 1851.

The defendant asserts that, during the period for which the rent is claimed, the zemindary right was in the possession of Ishur Chunder Moostofee and his heir, that a portion of the rent was deposited in Court in satisfaction of a decree passed against Moostofee, and a portion paid to his heir.

The plaintiff obtained a decree in a suit for possession on the 5th December 1854. The Deputy Collector considers that, prior to this decree, the right of the plaintiff was not established, and she did not obtain possession, and gave the plaintiff a modified decree for the rents for the end of the first half-year of 1260, disbelieving the genuineness of a receipt for the rents of the last half of that year.

From this decision the defendant appealed, and the plaintiff filed a cross-appeal under Section 348, contending that he was entitled to all the rents from the date of the purchase.

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The defendant produced two receipts, one dated the 8th of June 1852 for rupees 5,100, and the other the 27th September 1852 for rupees 2,400, which shew that the defendant paid these sums in satisfaction of decrees against the former proprietor Ishur Chunder Moostofee. The Principal Sudder Ameen allowed the defendant these sums in the account against the plaintiff; and, as there is apparently nothing to show that, prior to the time when these payments were made, the defendant had any notice, either actual or constructive, of the plaintiff's title, the propriety of the allowance of these payments was not disputed before us.

He also filed two receipts, dated the 3rd of March 1853 for rupees 1,200, and of the 25th of June 1853 for rupees 1,200 paid into the Court of the Principal Sudder Ameen, in satisfaction of decrees against Ishur Chunder.

There is ample evidence that, prior to the 3rd of March 1853, the defendant was fully aware that the plaintiff was entitled as auction-purchaser, and had taken steps to assert his title to the rent. A decree had been obtained by one Gunesh Pershaud against the former proprietors, and the Principal Sudder Ameen had issued two successive perwannahs for the attachment of the rent due and calling on the defendant to pay it into Court in order to satisfy the decree. The defendant on the 3rd March 1853 deposited in Court the rent of the first half-year of 1259, with a petition stating that the property had been sold to the now plaintiff, and praying that the money should not be paid into the Court, but retained in order that he might not be subjected to loss. The rent of the latter half-year of 1259 was deposited in Court by the defendant under similar circumstances. The Principal Sudder Ameen ordered the money to be paid out to the holder of the decree. It is to be regretted that the defendant should now be called upon to pay the rent of these two half-years a second time. But it is his own fault that he submitted and paid his rent to the account of a person who had no title to it, for we think that the Principal Sudder Ameen had no authority to direct the tenant to pay his rents into Court, and to make them over to the decree-holder more particularly, as it was brought to his notice that the defendant's title to the zemindary has ceased to exist.

We think it clear that, in point of law, the purchaser of a zemindary sold in execution of a decree is entitled to all the rents accruing due from the date of his purchase; and, if the tenants or ryots, after having had notice of his title, choose to continue to pay their rents to, or for the use of, the former proprietor, they do so at their peril, and cannot plead such payments in answer to a suit for rent by the new owner. It is no doubt equally true that, if the auction-purchaser omits to give notice of his title to the tenants, and the tenants misled by the want of such information continue to pay their rents to the former proprietor, the auction-purchaser must bear the consequences of his neglect according to the rule stated in Thakoor Doss Gossain and Petumber Roy, S. D. A. Rep. 23rd June 1859, p. 822, *viz.* that, "until the tenant has a clear and "distinct notice, either *actual* or *symbolical* "(which last is usually done in this country "by placing a bamboo on the land), the "transfer of the old proprietary right of "ownership cannot be said to bind the "tenant."

The defendant pleaded for the first time orally before us a plea of limitation. But as this defence had not been raised in the Lower Court, where it might have been pleaded and possibly answered. We thought that, according to the authority of Mussamut Emam Bandi *versus* Hurgovind Ghose, 4 Moore's Ind. App. 403-414, we ought not to allow it.

It is not necessary to go into the point which the appellant brought before us, *viz.*, that the Deputy Collector was wrong in rejecting the receipt of the 25th of June 1853 as not genuine, as we think it clear that, assuming this document to be genuine, which we, in fact, think it is, the plaintiff respondent is entitled to recover rupees 2,400 for the year 1259, rupees 2,400 for 1260, and rupees 2,400 for the year 1261, in all rupees 7,200, and interest at the rate of 12 per cent. per annum to be calculated from the respective dates when the several half-yearly instalments became due, and with costs and interest.

We think that this is not the case in which we ought to give damages under Act VI of 1862, though, as the suit was commenced after the passing of that Act, we should have had the power to award such damages if we thought that the circumstances of the case called for such a judgment.

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The 27th January 1864.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Shumbhoonauth Pundit, *Judge.*

Section 33 Act X of 1859—Agent (Suspension of).

Case No. 2541 of 1862 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. A. Elphinstone Dalrymple, Additional Judge of Dacca, dated the 24th July 1862, *reversing the decision of Mr. F. B. Simson, Officiating Collector of that District, dated the* 14*th March* 1862.

Muddun Mohun Roy (Defendant) *Appellant,*

versus

Gopee Mohun Roy (Plaintiff) *Respondent.*

Baboos Prosonno Coomar Sen and *Chunder Madhub Ghose* for Appellant.

Baboos Romesh Chunder Mitter and *Kali Mohun Doss* for Respondent.

If a principal suspends an agent, the agency must be held to have been determined within the meaning of Section 33 Act X of 1859.

Peacock, C. J.—THIS case is said to be a suit brought for a balance due upon a "nikas," or adjusted account. But it really is a suit brought by a zemindar against his agent for monies received by the agent on his account. The first plea is that of limitation, and that was decided by the first Court in favor of the defendant. The Lower Appellate Court reversed that decision.

The first question is whether the suit is barred by Section 33 of Act X of 1859. That Section requires a suit for the recovery of the money in the hands of an agent, or for the delivery of accounts or papers by an agent, to be brought either during the agency or within one year after the determination of the agency. The defendant contends that he had been suspended from his agency more than one year before the commencement of the suit, and the first Court decided the question of limitation in his favor upon that ground. We think that, if a principal suspends an agent, the agency must be held to have have been determined within the meaning of Section 33 of Act X of 1859 from the time of the suspension. But we are not in a position to determine whether the action is barred by limitation, because it has not been found how long the agent had been suspended when the action was commenced. The Judge reversed the decision of the first Court as to limitation, without giving any reasons for his decision. He merely says "the case was brought within time, and is not barred." He furnishes no data from which this Court can say whether he was right or wrong in that respect.

The next and most material question is with reference to the merits of the case. It appears that the agent furnished an account according to which nothing was forthcoming to the zemindar. In that account there were several items amounting to 107 rupees, with which the agent debited the zemindar, and which, if allowed, more than covered the zemindar's claim amounting to 106 rupees. It appears, however, that the zemindar, in the absence of the agent, struck out those items, leaving a balance in his own favor. There is no proof that the agent ever admitted that the zemindar was right in disallowing those items, or ever consented to the adjustment of the account in that manner. The Lower Court of Appeal has not found whether the items were rightly charged or not.

The case must, therefore, be remanded to the Lower Court of Appeal, *first,* to ascertain how long before the commencement of the suit the agent had been suspended. If the Judge find that the suit is not barred by limitation, having regard to the rule above laid down, he will ascertain whether the items amounting to 107 rupees were correctly disallowed or not. The Judge should have found what the facts were, and applying the law to such facts, should have stated his reasons for over-ruling the decision of the first Court.

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The 2nd February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Limitation (Time for pleading).

Case No. 964 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. E. Jackson, Additional Judge of Nuddea, dated the 14th January 1863, affirming a decision passed by Mr. W. L. Heeley, Deputy Collector of that District, dated the 23rd August 1862.

Brindabun Chunder Sircar Chowdry and others (Defendants) *Appellants,*

versus

Mr. G. Clarke and others (Plaintiffs) *Respondents.*

Baboo Romanath Bose for Appellants.

Mr. R. T. Allan for Respondents.

Where the plea of limitation was not taken in either of the Lower Courts, or in the grounds of special appeal, it was not allowed to be urged at the hearing of the special appeal.

Campbell, J.—In this case limitation is urged by the pleader for the special appellant; but as no such plea was taken in either of the Lower Courts, or in the grounds of special appeal, we cannot hear it now.

The Judge finds as a fact that the established rent is rupees 31, and we see no ground for the special appeal, which is dismissed with costs.

The 2nd February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Relinquishment of land—Ootbundee ryot—Section 19 Act X of 1859.

Case No. 331 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. Elphinstone Jackson, Additional Judge of Nuddea, dated the 21st November 1863, reversing a decision of the Deputy Collector of that District, dated the 30th August 1862.

Mr. Thomas J. Kenny (Plaintiff) *Appellant,*

versus

Issur Chunder Poddar (Defendant) *Respondent.*

Mr. R. T. Allan for Appellant.

Baboo Nilmadhub Sen for Respondent.

Where a landlord served a notice on an ootbundee ryot that, unless he paid at an enhanced rent for the ensuing year, he was to quit the land, and the ryot thereupon intimated to the landlord's agent his intention to relinquish the land,—Held that there was a sufficient compliance with Section 19 Act X of 1859.

Kemp, J.—The tenant in this suit is of the class called "ootbundee," a description of tenure which obtains in Zillah Nuddea. The ootbundee ryot is not a continuing tenant, but cultivates only a piece of land in one year, and another the next. We also find that the landlord in this case terminated the temporary lease of the ryot by serving upon him a notice that, unless he paid at an enhanced rent for the ensuing year, he was to quit the land. Further, it is found by the Court below as a fact that the ryot did give intimation of his intention to relinquish the land to the agent of the special appellant. Under these circumstances, and taking into consideration the temporary character of the holding of an ootbundee ryot, we think there has been a sufficient compliance with Section 19 Act X of 1859.

The appeal is dismissed with costs and interest.

The 4th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Enhancement—Bastoo lands.

Case No. 294 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. Elphinstone Jackson, Additional Judge of Nuddea, dated the 21st November 1862, affirming a decision of the Deputy Collector of Kooshteah, dated the 30th August 1862.

Mr. Thomas J. Kenny (Plaintiff) *Appellant,*

versus

Greedhur Manjee (Defendant) *Respondent.*

Mr. R. T. Allan for Appellant.

No one for Respondent.

Bastoo lands are not exempt from enhancement.

Kemp, J.—We think that this suit must be remanded. There can be no enhancement of rent on any lands in cases in which the value of the produce, or the productive powers of the land, have not been increased;

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but we know of no decision which entirely exempts bastoo lands from enhancement. Lands coming under the designation of bastoo, upon which crops are grown, are sometimes very productive, being well raised and capable of producing valuable crops, such as tobacco, pepper, &c. The Lower Appellate Court will decide this suit under the provisions of Section 17 Act X of 1859.

The 10th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Jurisdiction—Suit for possession with mesne profits and damages—Landlord a defendant.

Case No. 1646 of 1863.

Special Appeal from a decision passed by Mr. W. Wright, Principal Sudder Ameen of Rajshahye, dated the 28th February 1863, *affirming a decision passed by Baboo Bungshee Dhur Sein, Moonsiff of Commercolly, dated the 30th August* 1862.

Debranee Dassee (Defendant) *Appellant,*

versus

Shitol Kareegur (Plaintiff) *Respondent.*

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Appellant.

Baboos Shib Chunder Mozoomdar, Kishen Dyal Roy, Ishur Chunder Chuckerbutty, and *Bungshee Dhur Sein* for Respondent.

The Civil Court has no jurisdiction in a suit for possession with mesne profits and damages in which the plaintiff's landlord was the substantial defendant as regards possession.

Campbell, J.—This was a suit for recovery of possession of land, as well as for mesne profits and damages.

We find that plaintiff made his landlord a defendant and brought him into Court, and, in fact, the landlord was, in respect to the possession of the land, the substantial defendant, having given a pottah to the other defendants. We therefore think that in so far the Civil Court had no jurisdiction, and so much of the decree of the Lower Court as awards possession is annulled. But as this objection was not taken below, the award of costs will stand in favor of plaintiff.

The 10th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Jurisdiction—Suit for possession—Landlord a defendant.

Case No. 1608 of 1863.

Special Appeal from a decision passed by Moulvie Naziroodeen Mahomed Khan Bahadoor, Additional Principal Sudder Ameen of Hooghly, dated the 23rd April 1863, *reversing a decision passed by Baboo Hem Chunder Banerjee, Officiating Moonsiff of that District, dated the 9th April* 1862.

Nilumber Sen and others (Plaintiffs) *Appellants,*

versus

Haranund Sooree and others (Defendants) *Respondents.*

Baboos Hem Chunder Banerjee and *Doorga Doss Dutt* for Appellants.

Baboos Onookool Chunder Mookerjee and *Taraprosunno Mookerjee* for Respondents.

The Civil Court has no jurisdiction in a suit for possession in which the landlord was one of the defendants and the real party interested.

Kemp, J.—We think that the decision of the Lower Court is correct. The plaintiff made his landlord a defendant, and the suit was for possession of a tenure from which the plaintiff had been ousted. Though the third party is made a defendant and is backed by the landlord, the latter party is the real party interested; and as he is the party to whom the rent is payable, the suit is not cognizable by the Civil Court. Appeal dismissed with costs and interest.

The 11th February 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Putnee—Payment of revenue by putneedar.

Case No. 1103 of 1863 under Act X. of 1859.

Special Appeal from a decison passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 27th January 1863, *reversing a decision of the Deputy Collector of that District, dated the 26th August* 1862.

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Jotender Mohun Tagore (Plaintiff) *Appellant.*

versus

Mussamut Kishen Monee Dabee (Defendant) *Respondent.*

Baboo Sreenath Doss and *Bungsee Budden Mitter* for Appellant.

Baboo Debendro Narain Bose for Respondent.

The payment of revenue into the Collectorate by a putneedar, in order to save the estate from sale, when the zemindar's payment was credited by the Collector not as revenue but as a deposit, and a receipt granted to the zemindar accordingly, was held to be a sufficient payment of the putnee rent to the zemindar.

Jackson J.—THE plaintiff, a zemindar, sued to recover from the defendant, a putneedar in his estate, arrears of rent for three months on his putnee lease for the first quarter of 1269. The putneedar replied that he had deposited the revenue due to the Government from the zemindar in the Collectorate, to prevent the estate being sold, and that the Collector had credited his payment to the Government revenue, and that that payment was sufficient payment of the putnee rents to plaintiff.

The Deputy Collector decreed the claim. But the Judge found that the defendant's averment was correct, and dismissed it.

On special appeal it is said that the plaintiff had *paid in* his own Government revenue, and that there was no necessity for crediting the defendant's deposit to that revenue, and that the plaintiff is entitled to his rents, whether defendant deposited the revenue or not.

The Judge finds that the Collector made a mistake, and that the Collector should have credited the plaintiff's payment to the Government revenue, whereas he credited it to a deposit account. In this state of facts, the plaintiff himself was in fault, because he should have seen that he obtained a proper receipt showing that his money was received as payment for revenue, whereas he took a receipt showing that the money was received as a deposit, not as a payment. The plaintiff now says he ought not to suffer for the Collector's alleged mistake. This may be so, but it does not follow that the defendant should suffer. The plaintiff himself was certainly to blame, and it may be that the plaintiff was wholly to blame. We have no evidence on the point. But if the plaintiff paid the money as a deposit, and not as revenue, he would be wholly to blame. But whether wholly or only partly to blame, still he cannot recover his loss from defendant, who was not to blame at all. This appeal is dismissed with costs.

The 15th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Amendment of decree—Mooktear's Fees.

Case No. 412 of 1863 under Act X of 1859.

Miscellaneous Appeal from an order passed by Mr. V. T. Taylor, Officiating Collector of Rungpore, dated the 9th June 1863.

Bungsee Ram Shaha and Mohendro Narain Sircar, *Petitioners,*

versus

Juggurnath Shaha, *Opposite Party.*

Baboo Grija Sunker Mozoomdar for Petitioners.

Moulvie Murhumut Hossein for Opposite Party.

When a decree passed before Act VI of 1862 B. C. awarded costs including mooktear's fees (contrary to Section 71 Act X of 1859), the amendment of the decree in the execution stage by the Court executing the decree, instead of by application to the Court of first instance, was not interfered with, no injustice having been done thereby.

Kemp J.—THE decree of the Court of first instance, which was passed before the enactment of Act VI of 1862, awarded costs including mooktear's fees which ought not to have been charged under the provisions of Section 71 Act X of 1859.

The judgment-debtor should have applied to the Court of first instance for amendment of the decree, but as no injustice has been done, by this having been effected in the execution stage by the Court executing the decree, we dismiss the appeal with costs.

The 16th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Decree (according to defendant's admission).

Case No. 1408 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. E. F. Lautour, Judge of Patna, dat-

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ed the 12th February 1863, *reversing a decision of Moulvie Azeemooddeen Hossein Khan, Deputy Collector of that District, dated the 29th November* 1862.

Raj Coomar Sing and others (Plaintiffs) *Appellants,*

versus

Choto Raj Coomar Sing and Dossurut Sing (Defendants) *Respondents.*

Mr. John Baptist for Appellants.

Baboo Kissen Sukka Mookerjee for Respondents.

Where defendants admitted tenancy and their plea of payment was found to be false,—HELD that a decree should have been passed at the rates admitted by them, instead of dismissing plaintiff's whole claim, because he failed to prove the rates stated in the Luggit.

Kemp, J.—WE think that, as the defendants (special respondents) admitted tenancy, and their plea of payment was found to be false, a decree should have been passed at the rates admitted by the defendants. The whole claim of the plaintiff should not, under such circumstances, have been dismissed, because he failed to prove that the rates stated in the Luggit were correct. The decision of the Lower Court is amended with costs of all Courts in proportion to be paid respectively by the parties.

The 17th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Jurisdiction—Putnee.

Case No. 1417 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. E. F. Lautour, Judge of Patna, dated the 23rd April 1863, *reversing a decision of the Moonsiff exercising the powers of a Deputy Collector of that District, dated the 4th February* 1863.

Soobhul Sing and others (Defendants) *Appellants,*

versus

Meeto Sing and others (Plaintiffs) *Respondents.*

Mr. R. E. Twidale and *Baboo Kissen Sukka Mookerjee* for Appellants.

No one for Respondents.

A suit by one of a body of putneedars against his co-putneedars for his share of the rents collected by them is cognizable in the Civil Court, and not under Act X of 1859.

Kemp, J.—WE think that the first ground taken in the special appeal is a good one. This suit is brought by one of a body of putneedars against his co-putneedars for his share of the rents collected by the latter. Such a suit is cognizable in the Civil Court and not under Act X of 1859. It is not a suit against an agent employed in the management of land or collection of rent, such as is contemplated in Section 24 of Act X. The decision of the Lower Courts must be reversed with costs and interest.

The 17th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Jurisdiction—Ejectment.

Case No. 1586 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. H. S. Thompson, Officiating Additional Judge of Backergunge, dated the 30th December 1862, *amending a decision of the Deputy Collector of that District, dated the 15th November* 1861.

Koroonamoye Dossee (Intervenor) *Appellant,*

versus

Poorno Chunder Doss (Plaintiff) and others (Defendants) *Respondents.*

Mr. A. F. Lingham, and *Baboos Hem Chunder Banerjee* and *Lukhy Churn Bose* for Appellant.

Messrs. R. T. Allan, G. Gregory and *C. Gregory* for Respondents.

Where the alleged dispossessors are not zemindars or superior holders of land, there is no jurisdiction under Act X of 1859.

Campbell, J.—IN this case the plaintiff sued under Act X of 1859 alleging that he was dispossessed by certain persons, proprietors of the land, but holding *benamee* through another. The present special appellant was an intervenor, claiming by purchase from plaintiff and alleging collusion. The Judge finds that the plaintiff was not dispossessed by the zemindar. Making the dispossessors in effect mere wrong doers and disallowing the claim of the intervenors, he gives a decree for possession. We think that, as the facts are found by the Judge, the dispossessors not being zemindars or superior holders, there was no jurisdiction under Act X. We therefore decree the appeal with costs, leaving the parties to their remedy in the Civil Court.

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The 17th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Suit for kubooleut (against jotedars) —Holding at fixed rates—Rights of occupancy.

Case No. 1655 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. A. Elphinstone Dalrymple, Additional Judge of Chittagong, dated the 27th February 1863, *affirming a decision of Baboo Bugwan Chunder Bose, Deputy Collector of that District, dated the 19th December* 1861.

Ramzan Ali and another (Defendants) *Appellants,*

versus

Rajcoomar and others (Plaintiffs) Respondents.

Baboos Kishen Sukka Mookerjee and *Bhoyrub Chunder Banerjee* for Appellants.

No one for Respondents.

There is nothing illegal in a suit for a kubooleut against jotedars. The plea of holding at fixed rents cannot be urged by a defendant who, on his own showing, is not even a tenant with a right of occupancy.

Kemp, J.—We think that the plaint treated the defendants as jotedars and not as talookdars. There is nothing illegal in a suit for a kubooleut under such circumstances. A notice is with the record, and evidence of service appears to have been taken. We do not find that the non-service of notice was pressed on the attention of the Lower Appellate Court. The Court below has found that the defendants have not held their tenure at fixed rents, and the rate fixed appears to be that which prevails in the neighbourhood for lands of a similar quality. The dakhilahs filed by the defendant do not date further back than 1218 Mughee, so that on his own showing he is not even a tenant with a right of occupancy. We dismiss the appeal without costs, nobody appearing for respondents.

The 17th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Limitation—Section 14 Act XIV of 1859.

Case No. 2040 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. Hope, Officiating Judge of Hooghly, dated the 9th April 1863, *affirming a decision of Mr. J. R. B. Ross, Deputy Collector of that District, dated the 8th January* 1863.

Roy Kally Prosonno Sein (Plaintiff) *Appellant,*

versus

Kisto Nund Dundee and others (Defendants) *Respondents.*

Roy Sreenath Sein for Appellant.

Baboos Nil Madhub Bose and *Kadarnath Mazoomdar* for Respondents.

Where a plaintiff before 31st July 1861 erroneously sued to recover possession of land from which he had been illegally ejected, in the Court of the Principal Sudder Ameen, who did not return the plaint as presented to the wrong Court, until after the time prescribed for suits under Act X of 1859, the time so occupied was held not entitled to the benefit of Section 14 Act XIV of 1859.

Campbell, J.—This appears to be an extremely hard case. The claim seems to be one to recover the occupancy of land from which plaintiff has been illegally ejected under Clause 6 Section 23 Act X of 1859. Under Section 30 of Act X and Act LIII of 1860, it was incumbent on plaintiff to sue on or before 31st July 1861. Plaintiff erroneously sued in the Court of the Principal Sudder Ameen on 4th May 1861; but owing to the gross neglect of that functionary, it was not returned as presented to the wrong Court till 17th December 1862, after the time prescribed for Act X suits. Plaintiff claims the benefit of Section 14 Act XIV of 1859, inasmuch as he prosecuted his case in good faith in the wrong Court. But we cannot apply this provision, inasmuch as Section 14 of Act XIV expressly runs, "in computing any period of limitation *prescribed by this Act,*" whereas by Section 3 of the same Act, such a suit as the present is clearly exempted from the operation of the Act.

We fear that there is no remedy for the injury to the plaintiff caused by the extreme neglect of the Principal Sudder Ameen, and that we must dismiss the appeal with costs.

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The 17th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Rent—Presumption—Payments for each year, and surplus payments.

*Case No. 1832 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. C. Fowle, Officiating Judge of Rungpore, dated the 25th March 1863, reversing a decision of the Officiating Collector of that District, dated the 31st March 1861.

Tara Monee Dossee and others (Plaintiffs) *Appellants,*

versus

Kally Churn Surmah and others (Defendants) *Respondents.*

Baboos Nilmadhub Sein and *Grish Chunder Ghose* for Appellants.

Baboos Kishen Dyal Roy, Bhugobutty Ghose, and *Sibchunder Mozoomdar* for Respondents.

A payment on account of rent cannot be credited to previous arrears beyond the term of limitation.

The payments in each year must be presumed to be for the current year, and surplus payments to be for past not subsequent years.

Campbell, J.—PLAINTIFF claims arrears of rent. Defendant pleads payment. The payments for the last four years are established, but plaintiff claims to credit part of those payments to arrears of previous years beyond the term of limitation. No doubt plaintiff was entitled to place payments to credit of arrears, if the payments were made on that understanding. But we are inclined to think that the payments in each year must be presumed to be for the current year till the contrary is shown, and there is no proof that the money was paid otherwise than for the current year. If plaintiff wished to place the money to credit of arrears, he should have given receipts specifically for those years, and should have summoned defendant to produce the receipts, or should have produced chellans. So far the Judg is right. But he is wrong in the following, *viz.*, that he credits a surplus payment of 1256 to subsequent years. We think that the surplus payment must *primâ facie* be presumed to be for past, not for subsequent years. Excluding therefore the account of 1256, we amend the Judge's decree, and decree in favor of plaintiff for the amounts found to be due on the Judge's account for the years 1257, 1258, and 1259, that is, for Rs. 84 : costs in proportion.

The 17th February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Enhancement—Notice.

Case No. 1794 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. C. H. Campbell, Judge of Jessore, dated the 24th March 1863, amending a decision of Baboo Tarinee Churn Mookerjee Roy Bahadoor, Deputy Collector of Magoorah, dated the 14th August 1862.

Hurri Mohun Acharjee and others (Plaintiffs) *Appellants,*

versus

Okhoy Coomar Bose and others (Defendants) *Respondents.*

Baboos Grija Sunker Mozoomdar, Isur Chunder Chuckerbutty, and *Shib Chunder Mozoomdar* for Appellants.

No one for Respondents.

A plaintiff must be kept to the grounds of enhancement stated in his notice.

Campbell, J.—WE think that the Judge is right in thinking that the plaintiff must be kept to the grounds of enhancement stated in the notice, and that he cannot proceed on other grounds. It is found as a fact that there is no sufficient proof that the productive powers of the land have been increased. We dismiss the special appeal with costs.

The 22nd February 1864.

Present:

The Hon'ble G. Loch and J. P. Norman, *Judges.*

Rent—General payment (application of).

* Case No. 410 of 1863 under Act X of 1859.

Regular Appeal from a decision passed by Mr. Alexander Macleod, Deputy Collector of Mymensing, dated the 19th May 1863

* *See post*, same page, Case No. 410

* *See ante*, same page, Case No. 1832.

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Mr. Robert Ahmuty (Plaintiff) *Appellant*,

versus

Mr. K. Brodie (Defendant) *Respondent*.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Appellant.

Baboos Dwarkanath Mitter and *Sreenath Doss* for Respondent.

Suit laid at rupees 18,986-8.

A general payment made in one year, without proof that it was in satisfaction of the rents of that year, may be applied in satisfaction of the arrears of the previous year.

Norman, J.—This is a suit for arrears of the rent of certain property from Bysack to Cheyt 1266 B. S. The defendant proved the payment of large sums of money in the year 1266 and put in chellans, but neither on the face of the documents, nor by other evidence did he show any specific appropriation of the money at the time of payment to the rent of that year. The plaintiff claimed to apply rupees 13,000 to arrears of the year 1265. The Deputy Collector says, "as the suit is for arrears of 1266, it is not within the Court's cognizance whether the defendant owed rent for 1265 or not." This is a mistake. The defendant was bound to prove not only that he paid money in 1266, but that such payment was in accord and satisfaction of the rents of that year. It is a rule of law that, if a debtor have two distinct debts due to one creditor and make a general payment without saying to which debt the money is to be applied, it is in the option of the creditor to appropriate the payment to which account he pleases. If therefore there was an arrear in respect of the rents of 1265 B. S., the plaintiff had a right to apply such part of the money as was necessary for the purpose in satisfaction of the arrears of that year, and to the extent of such appropriation the defendant will fail in proof of his plea of payment of the rents of 1266. The case must be remanded for trial upon that principle, and will allow both parties to produce evidence as to the state of the accounts in 1265.

The 22nd February 1864.

Present:

The Hon'ble Shumboonath Pundit and G. Campbell, *Judges*.

Jurisdiction—Appeal—Revival—Section 58 Act X of 1859.

Case No. 294 of 1863 under Act X of 1859.

Miscellaneous Appeal from an order passed by Mr. C. S. Belli, Judge of Raj shahye, dated the 1st May 1863, *reversing an order of the Collector of Pubna, dated 30th January* 1863.

Kistonauth Biswas, *Appellant*,

versus

Brojender Nauth Bhadoory, *Respondent*.

Baboos Kali Mohun Doss and *Issen Chunder Chuckerbutty* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

The order of a Deputy Collector, admitting a revival under Section 58 Act X of 1859, is final under Section 13 Act VI of 1862 B. C. The Collector has no jurisdiction to hear an appeal from and reverse that order; nor the Zillah Judge to reverse the order of the Collector.

Shumboonath Pundit, J.—The Deputy Collector in a suit for dispossession of lands under Act X of 1859 decided the case, and then admitted a revival under Section 58 of that Act. From this order plaintiff appealed to the Collector, and that officer reversed the order of the Deputy Collector under Section 151 of the said Act. From this order the defendant appealed to the Zillah Judge, on the ground that, under Section 13 Act VI of 1862 of the Bengal Council, the Collector could not hear any appeal against the order of the Deputy Collector passed under Section 58 of Act X of 1859. The Judge thought the order of the Collector to be illegal, and, believing himself authorized under the general law to set aside this order, reversed the same. Against this order a petition is preferred to this Court, and reference is made to Section 35 of Act XXIII of 1860, under which this Court can take cognizance of the illegality or otherwise of the order passed by the Zillah Judge, as well as the Collector himself in appeal.

It is clear that the Judge had no power to reverse the order of the Collector, but he was right in holding that the Collector was wrong in hearing the appeal. The plaintiff urges that the order of the Deputy Collector also is illegal, as it was not passed in a case to which Section 58 of Act X of 1859 applies. The order

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of the Deputy Collector, however, is not subject to an appeal, and should not be interfered with in the present stage of the case. There is an appeal from the second decision of the Deputy Collector in which this point may be raised. We, therefore, order that the order of the Zillah Judge, as well as that of the Collector passed in appeal, be set aside, and that the original order of the Deputy Collector, admitting the revival, be upheld. Each party should bear his own costs.

The 24th February 1864.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Putnee (specific portion of)—Sale in execution.

Case No. 1562 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. O. W. Malet, Judge of Beerbhoom, dated the 24th February 1863, *affirming a decision of Baboo Radha Nath Gangooly, Deputy Collector of that District, dated the 30th August* 1862.

Poresh Nath Roy (Defendant) *Appellant,*

versus

Bishroop Dutt (Plaintiff) *Respondent.*

Baboos Onookool Chunder Mookerjee and *Mohesh Chunder Chowdry* for Appellant.

No one for Respondent.

A purchaser at a sale in execution of a decree of one of several estates let in one putnee is not bound by any agreement between the putneedar and other zemindars regarding their shares of the entire putnee rent. Nor can he claim from the putneedar, as his own share of the putnee rent, a sum bearing the same proportion to the whole putnee rent as the sudder jumma bears to the sudder jumma of all the estates let out in putnee. In order to obtain redress in such a case, either the putneedar or one or all of the zemindars may have their fixed putnee rent properly apportioned among the several zemindars by a civil suit in which all the zemindars should be parties.

Morgan, J.—The plaintiff purchased, at a sale in execution of a decree, one zemindaree estate belonging to the judgment-debtor, which had been leased by the latter, together with his several other zemindarees, by a pottah on a putnee lease at one fixed jumma to the special appellant The other zemindarees were also sold but separately and to other persons, in execution of the same decree. The plaintiff sued the defendant in the Court of the Collector of Beerbhoom, to obtain a kubooleut from him for the plaintiff's own share of the putnee rent, claiming as his share a sum bearing the same proportion to the whole putnee rent, as the sudder jumma of his estate bears to the sudder jumma of all the estates let out in putnee. The defendant relied on a certain paper, fixing the putnee rent of each of the zemindarees leased out to him in putnee, but this document was not considered as proved. Both the Courts decreed the claim of the plaintiff as laid by him. The Lower Appellate Court, with reference to certain documents produced by the defendant to show the separate shares of the putnee rent he had agreed to pay some of the purchasers of the other zemindarees, remarked that these agreements, executed by the defendant with others after the purchase by the plaintiff, could not be binding upon the latter. The Zillah Judge, apparently holding that defendant was not bound to pay in shares to all more than his entire putnee rents, observes that it was desirable that the right of all the purchasers should be investigated, so that a decree might be passed for dividing the entire rent proportionately between all the zemindars, but that no step could be taken to make all these persons parties to a suit under Act X of 1859; that, if the defendant had agreed to pay to any person more than his proportionate share according to the principle relied on by the plaintiff and adopted by the Lower Courts, the defendant should take steps to reduce that amount.

It is clear that the Judge is right in saying that the plaintiff is not bound by any agreement the defendant may have entered into with other zemindars regarding their shares of the entire putnee rent; and the defendant should not be required to pay on the whole more than his original rent for division between all the zemindars; and it is certainly desirable that all these persons should be parties to this suit. It is also clear that they cannot be made parties in a case under Act X of 1859, either as co-plaintiffs or as co-defendants. The Lower Court was wrong in supposing that such a suit could be effectually disposed of in any Court without the presence of all the other zemindars. Great litigation and annoyance would ensue to the defendant if he were sued separately by each of his zemindars to fix the share of the rent due to him, and the decree passed in each such case would not be evidence in other cases or binding upon others.

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Irrespective of technical objections, the principal of dividing putnee rent in proportion to the sudder jumma of each lot is wrong.

The putnee jumma is fixed with reference to the proceeds of an estate, and that does not bear in any two estates any defined and fixed rateable proportion to their respective sudder jummas. The public demand was not fixed on any calculation of rules of proportion to the gross assets; and these assets themselves were never ascertained with any degree of certainty. Even if this had been the case, it would not follow that the collections of several estates had neither increased nor decreased since the Permanent Settlement by natural or artificial causes, or had increased or decreased at one uniform rate. The decision in this case based upon such false data is erroneous. The redress asked for in this case cannot be given in a suit under Act X of 1859. Any party, either the putneedar or any one of the zemindars (if all will not join together as plaintiffs) may have the fixed putnee rent properly apportioned among the several zemindars in a civil suit in which all the zemindars should be parties; and the basis for this distribution may be either the paper referred to (if it be proved), or by taking the ascertained gross collections of each estate as the data for ascertaining the proportion.

In the view of the case, the appeal of the special appellant is decreed, the order of both the Lower Courts reversed, and the plaint of the plaintiff dismissed with costs.

The 25th February 1864.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Ejectment.

Case No. 1567 of 1863.

Special Appeal from a decision passed by Baboo Anund Chunder Banerjee, Principal Sudder Ameen of Rajshahye, dated the 26th February 1863, *affirming a decision passed by the Moonsiff of that District, dated the 7th November* 1862.

Afa Khan and others (Defendants) *Appellants,*

versus

Kissen Moonjoree Dossee (Plaintiff) *Respondent.*

Baboo Ishur Chunder Chuckerbutty for Appellants.

Baboo Debendro Narain Bose for Respondent.

Where the dispute between the parties was whether the plaintiffs who, by themselves and their ancestors had long held the land in dispute, could be lawfully dispossessed by the defendant who claimed it under a pottah recently granted by the zemindar,—HELD that the matter was one for adjudication by the Civil Court in an ordinary suit, and not a question between landlord and tenant.

Shumbhoonath Pundit, J.—PLAINTIFFS sued before the Moonsiff of Rajshahye to recover possession from Afa Khan defendant, who was alleged to have dispossessed the plaintiff's infant sons of lands held by them and by their father and grand-father before them as ryotee lands under the zemindars from whom the said defendant claims to derive his title as a tenant. The landlords also were afterwards, under Section 73 of Act VIII of 1859, made defendants in the case.

The Moonsiff at first dismissed the suit on the ground that, under Clause 6 Section 23 of Act X of 1859, the suit could not be tried by the Civil Courts.

The Principal Sudder Ameen on appeal remanded the case for investigating the allegations of the plaintiffs on the merits of the case, and, after trial, the Moonsiff gave a decree to the plaintiff.

On the defendants jointly appealing to the Principal Sudder Ameen, he agreed with the first Court in finding that the fact of the possession of the plaintiffs' sons and of their ancestors for two generations, and the

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ouster by the tenant defendant was established, and held that, though the lease given originally to the ancestor of the sons of the plaintiff was for life, yet, as after the death of the original tenant, the heirs were successively allowed by the landlords to hold the lands under the said pottah, the plea of extinction of all rights of the sons of the plaintiff based on the ground of the nature of the original pottah was no longer tenable. On these grounds, the Lower Appellate Court held that the right of occupancy, so acquired by the sons of the plaintiff, could not be injured by the zemindars granting a new pottah of the lands to the defendant.

Against this all the defendants have appealed to this Court, but the case was only argued on behalf of the zemindars.

They plead the same plea of the extinction of all rights under the lease on the ground of the nature of the original pottah, and the fact that the pottah itself was granted by a Naib who had no right to give any mokururee pottah.

The first plea is over-ruled upon the same ground that the Lower Courts properly rejected it.

With reference to the other fact, it is fit to remark that the determination of this case simply settles the fact of the existence of the lease, the ouster by Afa Khan, plaintiff's sons' right of occupancy, their title to recover possession from the ousting defendant, and to protect themselves from being dispossessed under the right of resumption claimed by the landlords on the ground of the nature of the original lease. As to the rights of the landlords to sue for assessment, it is not affected by the decision of this case, and they must have it determined by another suit instituted by them against the sons of the plaintiff.

As to the plea urged by the special appellant that, as virtually plaintiff complains of being dispossessed by his landlords, her present claim could only be tried in a suit under Act X of 1859 in the Collectorate, and not in any Civil Court.

We are of opinion that the dispossession complained of here is, as remarked by the Lower Appellate Court when remanding the case, an ouster not by the landlords, but by another party.

Merely because this party pleaded that his right to dispossess plaintiff's sons was based upon a title granted by the zemindars, it does not follow that, under the form adopted by the plaintiff, the Civil Courts were debarred from trying the case, though even there might have been ultimately occasion to arrive at this conclusion, the plaintiff was really dispossessed by no other persons, but the landlords of her sons. On these grounds the special appeal is rejected with costs.

Morgan, J.—The dispute between the parties was whether the plaintiffs who, by themselves and their ancestors had long held the land in dispute, could be lawfully dispossessed by the defendant who claimed it under a pottah recently granted by the zemindar.

This was a proper matter for adjudication by the Civil Court in an ordinary suit, and not a question between landlord and tenant.

I see no reason to doubt the correctness of the conclusion arrived at by the Lower Court as to the nature of the plaintiffs' interest in the land.

Dismiss the appeal with costs.

The 26th February 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Appeal—Default—Section 58 Act X of 1859.

Case No. 185 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 4th November 1862, affirming a decision passed by the Deputy Collector of that District, dated the 7th April 1862.

Messrs. R. Watson and Co. (Defendants) *Appellants,*

versus

Porandhon Tehsildar and others (Plaintiffs) *Respondents.*

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Mr. R. T. Allan for Appellants.

No one for Respondents.

Section 58 Act X of 1859 does not extend to take away the right of appeal in a case where the defendant, having once appeared, is absent on the day of trial.

Morgan, J.—THE question in this case arose as follows :—The suit was under Act X of 1859. A summons issued, and the defendant appeared. He was present by himself or by his pleader at the time when the issues were settled. After the settlement of the issues, a day was fixed for the trial. On the day so fixed, the defendant was not present by himself or by his pleader, and the Court proceeded to dispose of the case under Section 68 of Act X of 1859, the Court being the Deputy Collector.

The provisions of the latter part of that Section are as follows :—

"If on any such day (*i. e.* the day fixed for the trial of any issue) one only of the parties appear, the issue may be tried and determined in the absence of the other party upon such proof as may be then before the Court."

Under that Section the Deputy Collector proceeded to decide the case *ex parte* upon such evidence as he had. There was an appeal to the Judge who held that, under the 58th Section of the law, he could not entertain the appeal. By that Section it is enacted that "no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared."

In this special appeal from the Judge's decision, the question we have to decide is whether he rightly held the case to fall within the 58th Section—what is the meaning of the words "a defendant who has not appeared"? The defendant in this case had appeared in former stages of the case, but he failed to appear by himself or by his pleader on the day fixed for the trial of the issues.

It seems to us that the provisions of Section 58 are not applicable to such a defendant. The defendant, having once appeared in the suit, is absent on the day of trial. By that absence he does not in our opinion lose his right of appeal. He may think that the case upon the evidence given by his opponent may fitly be left to the decision of the first Court in his absence, and yet he may have a right to contend before the Appellate Court that, upon the evidence so given, the Court has pronounced a decree which the evidence cannot support, or that there has been some fatal defect of procedure in the case, and that the decree cannot be sustained.

It seems to us that the language of the 58th Section does not extend to take away the right of appeal in such a case, and that it is competent to the defendant to raise in the Appellate Court any question (either as to the effect of the evidence, the Law of Limitation, the regularity of the proceedings, &c.) which he may ordinarily raise in a regular appeal.

We reverse the judgment of the Lower Appellate Court, and remand the case to the Judge for the trial of the appeal in the usual way.

The 26th February 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Limitation (Section 32 Act X of 1859.)

Cases Nos. 533 to 540 of 1863 under Act X of 1859.

Special Appeals from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 9th January 1863, *reversing a decision passed by Mr. F. G. Millet, Officiating Collector of Pubna, dated the 28th July* 1862.

Messrs. R. Watson & Co. (Defendants) *Appellants,*

versus

Rutnokanth Roy (Plaintiff) *Respondent.*

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Mr. R. T. Allan and *Baboo Mohincemohun Roy* for Appellants.

No one for Respondent.

Limitation under Section 32 Act X of 1859 runs from the date of the passing of the Act, and not from the date on which the Act came into operation.

Morgan, J.—THESE cases are governed by the decision of a Full Bench of this Court, dated the 25th August 1863, in Special Appeal No. 151 of 1863, in which it is held that limitation under Section 32 of Act X of 1859 runs from the date of the passing of the Act, and not from the day on which the Act came into operation.

The appeals are therefore decreed with costs, the decision of the Lower Appellate Court reversed, and the decision of the first Court revived.

Shumboonath Pundit, J.—In these eight cases special appellant was sued by the special respondents for arrears of rents due before Act X of 1859 was passed The Court of first instance under Section 32 of the Act, considering the following words in that Section "within three years of the passing of this Act," to mean within three years from the 29th April 1859, the date on which the Act received the sanction of the Governor-General, dismissed a portion of the claims.

On appeal the Zillah Judge holding that, as by Section 167 of the Act, the effectual operation of the law was suspended up to the 1st of August 1859, the three years mentioned in Section 32 were to be counted from that date, taking it as the period of the passing of the Act, remanded the case to the Lower Court.

The Lower Appellate Court further refers to Act LIII of 1860, by which cases of dispossession before the passing of Act X of 1859 regarding which, by an oversight of the Legislature a very imperfect, if any, provision was made in Section 30 of the latter Act, were pronounced cognizable up to 31st of July 1861. The Judge argues that, by this Act of 1860, the meaning of the words "from the passing of the Act" in Section 32 of the Act of 1859 clearly refers to the 31st of July 1859. Against this decision the special appellant has appealed.

We find that Act X of 1859 was passed on the 29th April 1859, but ordered not to take effect before the 1st of August of that year. This clearly was simply a suspension of the operation of the Act up to the 31st of July 1861 inclusive.

Now, by Section 32 of Act X of 1859, cases for recovery of arrears of rent were to be instituted under that Act within three years from the last day of the Bengalee year, or of the month of Jeit of the Fuslee, or Willaitee year, in which the arrear claimed shall have become due, and it was further provided "that, for arrears of rent due at the *passing of this Act*, suits were to be instituted *within three years after the passing of this Act*, or within the period now allowed for the institution of such suits in the Civil Courts, whichever may first expire." For any arrear of rent unpaid up to the 29th of April 1859, an action could be brought in *Civil Courts* up to the last day allowed by the Law of Limitation, but under no circumstances could such a case be taken to the Civil Courts after 31st of July 1859, even if any portion of the period of limitation had still to run.

From 1st of August 1859 all such suits were required to be instituted before Collectors up to the last day that they could be received under the old Law of Limitation, if it expired before the 29th of April 1862, but only up to that date when any portion of the period of limitation was yet remaining to run.

The construction of the Zillah Judge would extend the period up to which such actions could be instituted up to the 31st of July of the same year.

For all rents due after the 29th of April 1859 in Bengal, the action is to be brought in the Collectorate within three years from the last day of the Bengalee year for which the arrear is due. Act XIV of 1859 has nothing to do with Section 32 of Act X of 1859. By Section 30 of the latter Act, it was provided "that, except as otherwise provided, all suits instituted under this Act shall be commenced within the period of *one year* from the date of the accruing of the cause of action."

Now, by Clause 6 Section 23 of the same Act, suits for recovery of possession by a tenant against his landlord who may have, as such, illegally dispossessed the former, could be brought only before Collectors.

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From the wording of Section 30 of the Act, it was clear that, if any tenant had been dispossessed *more than a year* before the 29th of April 1859, when the law was passed, he could not sue after 30th of July 1859, when the law came into operation, either in the Civil or in the Revenue Courts, though before the passing of Act X he had full 12 years to bring his suit from the cause of action; and unaware of the possibility of such a rule as was afterwards enacted by this Section 30 being likely to be passed, had not thought of suing.

The Act being passed on the 29th of April 1859, and it being provided therein that it will take effect from the 1st of August 1859, such tenants out of possession for more than a year on the 29th of April 1859 had no remedy but to file their suits *before the Civil Courts*, between the 30th of April 1859 and the end of July of that year, after which date they had no remedy anywhere.

To avoid the inconvenience, and to remedy this defect, Act LIII of 1860 was passed.

As the wording of Section 30 of Act X of 1859 was general, and the law was to take effect from the 1st of August 1859, the Legislature adopted the 31st of July 1859 as the period by which a line of distinction was drawn between the cases for which new provision was made by the new law, and the cases left to be governed by the said Section 30 of the old law. Tenants dispossessed after the passing of the Act had by Section 30 of the old law one year from the cause of action, so that, if dispossessed on the 1st of May 1859' they could sue up to the 30th of April 1861. The law had already fixed their remedy, and they could not mistake it. If this Section 30 had expressly and solely referred to cases of dispossession *occurring before the passing of the Act*, and by Section 1 of Act LIII of 1860 passed on the 20*th December* 1860, (more than a year from both these dates), a period only of one year had been and could be given from the 30th July 1859, there might have been some fair ground to infer that the meaning of the words "the date of the *passing* of the Act" in Section 32 of Act X of 1859 had been fixed by the law of 1860 at the period of the commencement of the operation of Act X of 1859.

We have to decide the plain meaning of the words of Section 32 of the Act ; and by reference to the wording of the Act LIII of 1860, no assistance is gained. On the contrary, by comparing the words in Section 32 of Act X of 1859, with the wording of another Section of another law, we find much assistance in construing the meaning of the disputed words in the said Section 32 of the former law.

The wording of Section 18 Act XIV of 1859, by which the operation of the said Act was suspended for two years *from the passing of the Act*, and regarding the meaning of which *date* as mentioned in that Section, there cannot be, and has not been, any doubt whatever, shews it clearly that the date of the *passing* of the Act is the date on which it receives the sanction of the Governor-General. In Section 1 of the Act, in contradistinction to the passing of the Act, the words "before the date of the Act coming into operation" are distinctly used.

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The 29th February 1864.

Present:

The Hon'ble C. B Trevor and H. V. Bayley, *Judges.*

Oral evidence (to explain deed)—Jurisdiction—Mortgage—Lease—Damages (under Section 2 Act VI of 1862).

Case No. 609 of 1862 under Act X of 1859.

Regular Appeal from a decision passed by Moulvie Mahomed Abdool Luteef, Moonsiff, exercising the powers of a Deputy Collector in Zillah Shahabad, dated the 23rd September 1862.

Baboo Rambuddun Singh and others (Defendants) *Appellants,*

versus

Ranee Sree Koonwar, mother and guardian of Seodyal Singh minor (Plaintiff) *Respondent.*

Baboos Unnoda Persad Bannerjee and *Chunder Madhub Ghose* for Appellants.

Mr. C. Gregory and *Baboo Kalee Mohun Doss* for Respondent.

Suit laid at rupees 14,662-14½.

Though a document may be explained by oral evidence, oral evidence is not admissible to vary the terms of the written instrument when the terms are in themselves clear and undoubted. Thus, where the question was whether a ticca lease for which a kubooleut was given was a portion of a larger mortgage transaction or not, and whether or not the suit upon the kubooleut was cognizable under Act X of 1859, as there was an interval of six years between the dates of the mortgage and the lease, and the case was altogether silent as regards the mortgage and was not granted by the mortgagor to the mortgagee but by the latter to the former, the transactions were held to be separate and distinct, and the suit cognizable under Act X of 1859.

The award of additional damages under Section 2 Act VI of 1862 B. C. is discretionary and not imperative. Before awarding such damages, the Court, in the exercise of its discretion, must look to the condition of the parties, and the particular hardship inflicted on the landlord by the omission of the under-tenant to pay his rents.

Trevor, J.—PLAINTIFF Lala Devidyal, son of Ruggobut Roy, general attorney on behalf of Mussamut Ranee Sree Koonwar, mother and guardian of Seodyal Singh, heir of Sirdar Sehon Singh, deceased, mortgagee of Talook Ruggoobur, &c., Tuppeh Gobindee, Pergunnah Choinpore, sues Puryag Tewaree Ticcadar and Baboo Rambuddun Singh and others as sureties, to recover rents due from 1267 to 1269.

Plaintiff alleges that three sehans out of 5 sehans of Talook Ruggoobur, Tuppeh Gobindee, Pergunnah Choinpore, of which she holds a usufructuary mortgage, were leased by her to the defendant No. 1 for a term extending from the commencement of 1267 to the end of 1273 ; that on the 16th Bysack 1267 F, he executed a kubooleut covenanting to pay the rent therein mentioned, and that the other defendants became sureties for the Ticcadar pledging the three annas of the talook as security ; that the defendant Ticcadar, having obtained possession, paid only part, rupees 14,423-4, out of rupees 27,189, the amount of rent due from 1267 to 1269 Fuslee, leaving a balance of Rs. 12,765-12½ principal and Rs. 1,684-6 interest, altogether for Rs. 14,450-2½. Plaintiff therefore brings the present action for that sum with interest and costs, for additional damages under Section 2 of Act VI of 1862 of the Bengal Government, and cancelment of his lease under Section 78 of Act X of 1859.

The nominal Ticcadar in his statement avers that he has no concern with the property, and that he should be released from the suit with the payment of his costs.

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The written statement of the real defendant Ram Buddun Singh is to the effect that he is a mortgagor, and plaintiff a mortgagee in possession; that the ticca lease on which the present suit was based was portion of the mortgage transaction, and was executed with a view of clearing the accounts from interest; that the whole debt with interest has been liquidated from the usufruct of the mortgaged property, leaving a large surplus due by plaintiff to defendant; that as there exists a dispute between plaintiff and defendant regarding the payment of the sum due under the mortgage transaction, the present suit should be dismissed as one not cognizable under Act X of 1859; that he, defendant, was not in possession of the property covered by the lease during the year 1267, but it was in possession of plaintiff, who enjoyed the usufruct of it; that nevertheless he, defendant, from the date of the execution of the pottah up to the institution of the present suit, had paid plaintiff rupees 21,543 according to receipts filed; that consequently the present claim should be dismissed with costs.

The Principal Sudder Ameen did not find clearly whether there was any connection or not between the ticca lease on the kuboolent granted on which the present suit is based and the mortgage transaction or not. He was of opinion, however, on the whole evidence before him, that the claim of the plaintiff was correct with a very slight modification; that defendant was in possession of the lease during 1267, and had defaulted to the amount claimed by plaintiff; and that the averments of the defendant and that some of the receipts filed by him in support of them were false and fraudulent. As to the demand for additional damages, the Court, under the circumstances of the case, did not consider the plaintiff entitled, neither did it think it equitable to give him a decree for the cancelment of the lease. The Principal Sudder Ameen therefore gave plaintiff a decree as against Ram Buddun Singh, the real defendant, for rupees 13,842-14 with costs in proportion to the amount decreed, and interest at 12 per cent. per annum on the principal from the date of suit up to the date of the decree in his Court, and from this date up to that of payment on the aggregate sum decreed. The defendant Puryag Tewaree be exempted from liability with payment of his own costs.

From the decision of the Principal Sudder Ameen, an appeal has now been preferred to this Court by the defendant below Ram Buddun Singh, and it has been contended before us that the Principal Sudder Ameen's decision is defective, inasmuch as he has given no clear opinion as to whether the ticca lease forms a portion of the mortgage transaction or not; that the determination of this point is essential to the case, for on its determination the question depended as to whether the present action is cognizable under Act X of 1859 or not; that the decision of the Lower Court on the merits generally, and looking to the receipts filed by the appellant, is erroneous, and should be reversed. By the plaintiff below, it is contended under the power given to respondents by Section 348 of Act VIII of 1859 that, though the decree of the Court below is in the matters objected to correct, still, in addition to the principal and interest decreed to him with costs, he was entitled to the damages under Section 2 of Act VI of 1862 of the Bengal Government, the defendant appellant having neglected to pay rent without any reasonable or probable cause, and not having before the institution of the suit tendered such amount to the plaintiff, and also to an order for the cancelment of the lease under Section 78 of Act X of 1859.

There can be no question that the Principal Sudder Ameen should have determined

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formally and explicitly the plea in bar of the jurisdiction of the Court trying cases under Act X of 1859 raised by the defendant before him. His failure to do so, however, does not necessitate the remand of the case, as sufficient evidence exists on the record to enable us to determine the issues omitted by the Lower Court, *viz.* whether the ticca lease for which the kubooleut was given by the defendant is a portion of a larger mortgage transaction or not ; and if not, is the present suit cognizable under Act X of 1859.

We remark that the interval between the date of the usufructuary mortgage in favor of the plaintiff and the ticca lease granted by the mortgagor to the mortgagee is six years, the date of the former being 5th Jeit 1261, and that of the latter the 16th Bysack 1267. Moreover the ticca lease is altogether silent as regards the mortgage, and is not granted by the mortgagor to the mortgagee, but by the latter to the former. Under these circumstances, though undoubtedly a document may be explained by oral evidence, we could not admit oral evidence to vary the terms of the written instrument, which terms are in themselves clear and undoubted. Moreover, by the subsequent dealings between the parties which are in evidence before us, we are quite convinced that the transactions are separate and distinct, and that, consequently, the present suit is cognizable under Act X of 1859.

The next question before us is the amount due under the kubooleut, the existence of which is admitted by the defendant. After perusing the evidence as to possession and as to the receipts filed by the defendant, we see no reason for differing from the conclusion at which the Principal Sudder Ameen has arrived. We think that possession in 1267 was undoubtedly with the defendant, that collections to the amount of Rs. 11,000, as averred by the defendant, were not made by the plaintiff during that year, and that the evidence produced by the defendant is insufficient to establish the genuineness of the four receipts filed by him amounting to Rs. 9,410. Such being our opinion on the points raised by the defendant appellant, the case would here be concluded, had not the plaintiff respondent, under Section 348 of Act VIII of 1859, claimed additional damages from the defendant under Section 2 Act VI of 1862. That, on our finding, the defendant did without reasonable and probable cause omit to pay the plaintiff the rents due is clear. But the award of additional damages is discretionary and not imperative on the Courts, and before awarding these damages, the Court, in the exercise of its discretion, must look to the condition of the parties and the particular hardship inflicted on the landlord by the omission of the under-tenant to pay his rents, before it will call into action the penal terms of the Act above cited. In the present instance we think any inconvenience arising to the former is sufficiently remedied by the award of interest at 12 per cent. upon the rent due by the lease-holder. We therefore see no ground for interfering with the mode in which the Principal Sudder Ameen has exercised the discretionary power given him by the Act of 1862.

But though we see no ground for interfering in this particular, we think plaintiff is entitled to a conditional order for the cancelment of the lease.

We therefore affirm the Principal Sudder Ameen's decision, with this additional order that the lease be cancelled, unless within fifteen days from the date of the decree the amount of the arrear now decreed with interest up to the date of payment, and the costs of the suit both below and in appeal be paid by the defendant appellant into the Court below.

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The 1st March 1864.

Present:

The Hon'ble H. V. Bayley and L. S. Jackson, *Judges.*

Jurisdiction.

Case No. 416 of 1863 under Act X of 1859.

Miscellaneous Appeal from an order passed by Mr. A. E. Russell, Judge of Moorshedabad, dated the 4th June 1863, *affirming an order passed by the Collector of that District, dated the 24th April* 1863.

Messrs. Robert Watson & Co. *Appellants,*

versus

Mr. Hedger and others, *Respondents.*

Mr. R. T. Allan for Appellants.

Messrs. Berners, Sanderson, and Fergusson, and *Baboo Bany Madhub Banerjee* for Respondents.

It is the cause of action stated, and the remedy sought by the plaintiff, and not the answer ma le by the defendant, which must determine whether a suit is cognizable by the Revenue or the Civil Court.

Jackson, J.—We are quite satisfied that the Lower Courts were right in holding this suit not to be cognizable under Act X of 1859.

The plaintiffs sued defendant as a stranger in possession of land belonging to them to which he had no right.

Mr. Allan urges that the defendant alleged the relation of landlord and tenant to exist between plaintiffs and himself.

This however was an averment quite irreconcilable with the plaintiff's allegation, and it is the cause of action stated, and the remedy sought by the plaintiff, not the answer made by the defendant, which must determine the jurisdiction of the Court.

In like manner, if the plaintiff had sued the defendant as his tenant, and the defendant had denied the tenancy and claimed to hold by some independent right, the Court, looking to the plaintiff's statement which disclosed a case within its jurisdiction, would have tried the case; but if it found the plaintiff's allegations unproved, would have dismissed the suit.

We therefore affirm the Judge's decision and dismiss the appeal with costs.

The 2nd March 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Enhancement — Presumption under Section 16 Act X of 1859—Onus probandi.

Case No. 855 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. H. S. Thompson, Officiating Additional Judge of Backergunge, dated the 23rd December 1862, *reversing a decision of the Deputy Collector of that District, dated the 26th November* 1861.

Dhun Sing and another (Defendants) *Appellants,*

versus

Chunder Kant Mookerjee (Plaintiff) *Respondent.*

Baboos Kalee Mohun Doss and *Luckee Mohun Bose* for Appellants.

Baboos Sreenath Doss and *Aushootosh Dhur* for Respondent.

In a suit for enhancement, the presumption under Section 16 Act X of 1859 established by 20 years' holding at a uniform rate, cannot be rebutted by the fact that the plaintiff did not obtain direct possession of the estate for many years, and was for other reasons prevented from suing; but the *onus* is on the plaintiff to prove that the present rent has been varied or fixed at a period subsequent to the Decennial Settlement.

Campbell, J.—This is a suit for enhanced rent. The tenure is claimed by defendant to be of the character described in Section 15 of Act X of 1859. Special appellant, dating his holding from time immemorial, claims the benefit of the 20 years' presumption as laid down by Section 16. It is found that in truth defendants have held at a uniform rent for more than 20 years. But the Judge gets over the presumption by finding that the present plaintiff did not obtain direct possession of the estate for many years, and was for other reasons prevented from suing, and that therefore he should not be prejudiced. He, on that ground, threw the *onus* of proving a fixed rent from the time of the permanent settlement on the defendant. But we can find no warrant whatever for the Judge's doctrine in Act X of 1859. The presumption of law established by 20 years' holding at a uniform rate is absolute and unqualified. It was for the plaintiff to show that the present rent has been varied or fixed at a period subsequent to the Decennial Settlement. The Lower Court properly so fixed

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the issues, throwing the *onus* on plaintiff, and found for defendant. Appellant urges that, on the record as so framed, there is no evidence whatever to show that the rent was fixed at a date subsequent to the Decennial Settlement. Respondent can show no such evidence. We think that plaintiff has entirely failed to prove any thing which contradicts the presumption arising under Section 16. The *corpus* of the rent remaining the same, we think that the attempt to show the imposition of extra cesses or *akrajat* will not avail the plaintiff. We therefore reverse the decision of the Lower Appellate Court, and uphold that of the Court of first instance, with costs in favor of special appellant.

The 5th March 1864.

Present:

The Hon'ble F. B. Kemp and Shumboonath Pundit, *Judges.*

Jurisdiction—Section 35 Act XXIII of 1861.

Case No. 138 of 1863 under Act X of 1859.

Miscellaneous Appeal from an order passed by Mr. A. V. Palmer, Collector of Hooghly, dated the 22nd June 1863, affirming an order passed by the Deputy Collector of Howrah.

Toyluckonath Sirdar, *Appellant,*

versus

Baluck Ram Doss, *Respondent.*

Baboos Prosunno Coomar Sein and *Romesh Chunder Mitter* for Appellant.

Baboo Baney Madhub Banerjee for Respondent.

Where a Collector exceeded his authority by deciding upon the genuineness of a deed of sale propounded by the plaintiff, his order was set aside by the High Court under Section 35 Act XXIII of 1861.

Shumboonath Pundit, J.—THE respondent Baluck Ram Doss instituted a suit against the appellant for the recovery of Rs. 3-1-8- as arrears of rent under a kubooleut for a parcel of five cottahs of land out of lands alleged to have been purchased from the defendant. The defendant denied the execution of the kubooleut or sale of any land, but admitted that he had mortgaged a parcel of land to the plaintiff, but exclusive of the lands in dispute which he averred were in his possession. The Deputy Collector of Howrah decided that the question of sale or mortgage was an issue to be decided in the Civil Courts; and that he could decide only the issue regarding the execution of the kubooleut. On this he found that the kubooleut was not established, and so dismissed the case of the plaintiff.

On the appeal of the plaintiff, the Collector of Hooghly decreed the claim on the 22nd of June 1863, on the ground that the purchase of the plaintiff was proved, and the plea set up by the defendant not established.

Against this decision this petition of appeal is preferred under Section 35 of Act XXIII of 1861, on the ground that this suit falling under the provisions of Section 153 of Act X of 1859, the appeal should have been to the Zillah Judge; and that, supposing the present suit does not come under that provision, the Collector has exceeded his powers in deciding upon the genuineness of a deed of sale propounded by the plaintiff, and denied by the appellant.

It is clear that it was a case in which the appeal was to be preferred to the Collector, and not to the Zillah Judge; but the Collector was not authorized to proceed to try the title of the plaintiff in the manner that he has done. As this Court has authority in such a case to interfere, as the record has been sent for and examined, the record does not show any reason why this order of the Collector should be allowed to stand.

It is ordered that this order of the Collector be set aside, and the appeal of the appellant decreed with costs and interest. The Collector may try *de novo* the appeal regarding the fact of the execution of the kubooleut.

The 14th March 1864.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble F. B. Kemp, *Judge.*

Pleading — Evidence — Statement under Act VIII of 1859—Confession and Avoidance — General custom.

Case No. 271 of 1862 under Act X of 1859.

Special Appeal from a decision passed by Mr. G. P. Leycester, Judge of Shahabad, dated the 9th December 1861, reversing a decision of the Moonsiff with the powers of a Deputy Collector in that District, dated the 31st March 1861.

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Lallah Probhoo Doss and Gobind Doss, after the death of Mussamut Doolhin Amrit Kooer, Guardians of Baboo Deneghee Mudun Pershad and others (Plaintiffs) *Appellants*,

versus

Sheonath Roy and Ramgut Roy (Defendants) *Respondents*.

Moonshee Ameer Ally and *Syed Murhumut Hossein* for Appellants.

Baboo Romanath Bose for Respondents.

A statement under Act VIII of 1859 is not in the nature of confession and avoidance as in English pleading, where the confession is considered as an admission of the party and the avoidance has to be proved. The statement of one party, if used as evidence against him by the other, must be taken altogether and not in part.

A general custom is not proved by the statements of two individuals, or by proving that two particular tenants paid at a particular rate.

Peacock, C. J.—In this case the plaintiff sued for 706 and odd rupees for rent and interest on that rent from 1262 to 1267. The plaint sets forth that altogether 37 and odd beegahs were in the possession of the defendant, of which 30 beegahs were rented at 2 Rs. per beegah, 3 beegahs at 1 rupee 5 annas per beegah, and 4 beegahs at 5½ Rs. per beegah annually, amounting in the aggregate to about 95 Rs. per annum; that 50 Rs. had been paid in the current year, and that the remainder was due with interest calculated upon it. The defendant admits the quantity of land, but denies the rate, and objects to the charge of interest. He states that, by the precedent of Maharajah Mohessur Bux Sing, no interest should be allowed in a suit for arrears of rent; that, according to the custom of the mouzah, the rates claimed could not be decreed; and that the jummabundi of 1260 was prepared in collusion with the putwarries. The defendant goes on to say that of the 37 beegahs in his possession, 33 beegahs were held at the rate of 1 rupee per beegah, and 4 beegahs at 1 rupee 8 annas per beegah, making altogether about 41 Rs. per annum; and that 231 Rs. were paid, but had not been credited to him. The Judge says that the plaintiff has not proved his case, and that altogether the whole evidence adduced by him was most unsatisfactory.

It is now said that the Judge was wrong, and that, as the defendant had admitted that he held the quantity of land mentioned in the plaint, he was bound to prove by evidence that he had paid sufficient to cover the rent. But the defendant, at the same time that he admitted the holding, stated the rates at which he held, and that he had paid 231 Rs. on account of his rent. If the defendant's statement is true, he paid enough to cover the rent, and we see no reason for disbelieving the statement. If the plaintiff uses it as evidence against the defendant, he must take the whole admission together. A statement under Act VIII of 1859 is not in the nature of confession and avoidance as in English pleading, where the confession is considered as an admission of the party, and the avoidance has to be proved. But here each party comes into Court with his own statement which, if used as evidence against him, must be taken altogether and not in part, and the plaintiff cannot put in one part of it as an admission without putting in the whole. The principle of pleading now is that the parties come into Court in person or by their agents, and make their statements. If the statement of one party is used as evidence against him by the other, the Judge is not necessarily bound to believe the whole statement. He may believe one part of it, and disbelieve the other part. But he ought not to do so without some good reason. There was nothing in the defendant's admission taken as a whole which threw upon him the *onus* of proof.

Then it is said that the Judge was wrong in rejecting two decrees against other parties as evidence against the defendant, to prove the custom of the mouzah. If those decrees showed that the defendant in those suits paid at the rate claimed by the plaintiff, they would not prove a custom. A general custom is not proved by the statements of two individuals, or by proving that two particular tenants paid at a particular rate. They might have paid it under a pottah, and the learned vakeel for the plaintiff who argues that the Judge is wrong has been unable to say whether those decrees were brought under a pottah or not. Therefore it is clear that the Judge was right in regarding them as decrees *inter alios*, and in rejecting them as evidence against the defendant.

The decree of the Lower Appellate Court is affirmed with costs and interest.

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The 14th March 1864.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Jurisdiction—Suit for share of rent against tenant and co-lessors.

Case No. 2203 of 1861 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. A. Lushington, Judge of Tirhoot, dated the 24th September 1861, *reversing a decision of Roy Fakir Chund Loll, Deputy Collector of that District, dated the 1st June* 1861.

Lalla Isree Pershad and Kally Pershad, (Plaintiffs) *Appellants*,

versus

Mr. Stuart and others (Defendants) *Respondents*.

Baboos Unnodapershad Banerjee and *Dwarkanath Mitter* for Appellants.

Moonshee Ameer Ali and *Baboo Kissen Kishore Ghose* for Respondents.

A suit for a share of rent against a tenant and co-lessors is not cognizable by the Collector as a suit for rent within the meaning of Clause 4 Section 23 Act X of 1859.

Peacock, C. J.—This was a suit brought by some of several lessors against the tenant and others of the lessors, claiming a right to recover a particular share of the rent, the whole of which had been credited to the defendant in account by the other lessors who were made defendants. The question is whether this is a suit merely for arrears of rent due on account of land within the meaning of Act X of 1859, Section 23, Clause 4. If the suit had been against the tenant alone, and the question had been simply whether the rent was paid or not, it would have been one for arrears of rent due on account of land. But this was a joint lease, and the rent has been paid to some of the co-lessors, who contend that they advanced the money to purchase the estate.

We think that this suit is not a suit which under Act X of 1859 ought to be brought before the Collector; that it is not a suit merely for rent, but is partly to try the right of the several landlords as between themselves. Therefore, the Judge was right in dismissing the suit. If the Judge was right in dismissing the suit, it is not necessary for us to concur in his reasons. The decree of the Lower Court is therefore affirmed with costs and interest.

The 16th March 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges*.

Section 35 Act X of 1859—Statement of claim (Authority of Tehsildar to present).

Case No. 1482 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. O. Toogood, Judge of Cuttack, dated the 4th September 1862, *reversing a decision passed by the Deputy Collector of that District, dated the 30th June* 1862.

Romanath Roy Chowdry (Plaintiff) *Appellant*,

versus

Joydeb Mohapatro and others (Defendants) *Respondents*.

Baboos Romanath Bose and *Gopal Lall Mitter* for Appellant.

Baboo Uprokash Chunder Mookerjee for Respondents.

A tehsildar, suing for the rent of the mehal of which he makes the collections, must be presumed (until the contrary is shown) to be an agent with personal knowledge authorized by Section 35 Act X of 1859 to present a statement of claim.

Trevor, J.—The tehsildar of Romanath Roy Chowdry, zemindar, sued the defendants for certain rents due by them to the zemindar. The defendants pleaded payment. The first Court gave plaintiff a decree. The Judge dismissed the suit, remarking that the statement has not been presented in accordance with Section 35 of Act X of 1859.

The special appellant has now appealed from this order; and, after a consideration of the circumstances of the case, we are clearly of opinion that the Judge's order cannot stand.

By Section 35 of Act X a claim may be presented, either by the plaintiff or by an authorized agent of the plaintiff who has personal knowledge of the facts of the case, or by an agent accompanied by a person who has such knowledge.

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Now *primâ facie* a tehsildar suing for the rent of the mehal of which he makes the collections, is an agent with personal knowledge. His authority may be questioned either by the defendant or the Court, in which case he should be called on to prove his authority. But to determine that he has no authority because he is a tehsildar, is not a reasonable course of proceeding. In the present case the defendant has not questioned plaintiff's authority. If the Court see reason to question it, he should have an opportunity of proving it. If the Court see no reason, in the absence of objection on the part of the defendant to question his authority, that authority may be presumed, and the case proceed to a hearing.

The case is remanded to the Judge, who will dispose of it, keeping in mind the foregoing remarks.

The 18th March, 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Ejectment—Section 78 Act X of 1859.

Case No. 1485 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. C. H. Campbell, Additional Commissioner, with powers of a Judge, of Jessore, dated the 8th November 1862, *reversing a decision of Baboo Kali Chunder Banerjee, Deputy Collector of that District, dated the 25th July* 1862.

Mr. R. Savi (Plaintiff) *Appellant,*

versus

Mohesh Chunder Bose (Defendant) *Respondent.*

Mr. R. T. Allan and *Mr. A. F. Lingham* for Appellant.

Baboos Mohendro Lall Shome and *Grees Chunder Ghose* for Respondent.

Where, in a suit for the rent of the current year and for ejectment under Section 78 Act X of 1859, supported by a previous unsatisfied decree, a decree was passed for the rent of the current year without including the amount claimed under the previous unsatisfied decree, and the plaintiff neither applied to the Lower Court to amend its decree, nor appealed against that part of it,—HELD that the defendant, having paid the amount of arrear specified in the decree, had saved himself from ejectment.

Kemp, J.—THIS was a suit brought by Mr. Savi for arrears of rent for the current year amounting to ten rupees, and for ejectment of the ryot under Section 78 Act X of 1859. An unsatisfied decree for arrears of rent, amounting to 169 rupees, was adduced in support of the prayer for ejectment. The ryot in the first instance was absent, and the suit proceeded *ex parte.* A decree was passed for 12 rupees for the rent of the current year, the amount claimed under the unsatisfied previous decree not being included as enjoined by the terms of Section 78. The ryot, under Section 58 Act X, applied for a review, and obtained it. The case was brought on in the presence of both parties, and the first *ex parte* decree was upheld in its integrity. The ryot paid within fifteen days from the date of the second decree the amount of arrear specified in the first decree, *i. e.* 12 rupees, and thus saved himself from ejectment. The Judge has held that the ryot has done all that the law requires him to do.

In appeal it is contended that because, through an omission of the Deputy Collector, the amount covered by the old unexecuted decree has not been specified in the decree under Section 78, such mistake being the mistake of the Court of first instance, the case must go back, in order that the Deputy Collector may amend his decree. But we think that this contention is wrong. The plaintiff could have applied to the Lower Court to amend its decree, or he might have appealed against so much of the decree of the first Court as omitted to include the old unsatisfied balance. The law is clear, to wit, that the amount of the arrear *shall* be specified. The ryot in this instance has paid all that the decree specifies, and he has saved his tenure. If the plaintiff has any claim under the old decree, he can enforce it. The appeal is dismissed with costs and interest.

The 18th March 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Lakheraj—Assessment—Resumption.

Case No. 1302 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. E. G. Birch, Officiating Additional Judge of East Burdwan, dated the 25th February 1863, *reversing a decision of Mr. Trevor Grant, Deputy Collector of that District, dated the 27th August* 1862.

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Matunginee Debea (Plaintiff) *Appellant,*

versus

Mahomed *alias* Booree Meah (Defendant) *Respondent.*

Baboos Kissen Succa Mookerjee and *Prosunno Coomar Sen* for Appellant.

Baboo Debendro Narain Bose for Respondent.

The fact of a ryot, being in possession of lands under apparently genuine sunnuds, is sufficient to entitle him to resist the zemindar's claim to assess him, unless the zemindar can show that the ryot has paid him rent; otherwise he must bring a regular suit for resumption.

Steer, J.—PLAINTIFF, appellant, sued to enhance rent on 110 beegahs of land on service of notice. Defendants plead that they hold 3 jummahs not in the aggregate 110 beegahs. They say they hold under a pottah of 1191 B. S. 49 beegahs under one jummah; they hold under another jummah 3 beegahs, and under a third 14 beegahs. They aver that they have held the lands at a uniform rate for more than 20 years, and are therefore protected. Besides the above 3 jummahs, they hold the rest of the 110 beegahs as lakheraj; so it is allowed in their oral statement.

The Deputy Collector dismissed the plaintiff's claim on two grounds: that as to the lakheraj lands, the plaintiff must go to the Civil Court; that as to the jummah lands, the defendants were protected under their pottah.

Plaintiff appealed to the Judge, who remanded the case in order to try whether, as regards the 3 beegahs and the 14 beegahs, they are protected from enhancement, as they are not included in the pottah; and in respect to the 49 beegahs covered by the pottah, and with respect to the order referring the plaintiff to the Civil Court, he upheld the decision of the Deputy Collector.

In special appeal it is urged, 1*st*, that the decision of 1807 to which the plaintiff was no party, is not binding against the plaintiff; 2*nd*, it was wrong in the Judge, merely on the ground of the defendant's statement that the lands are lakheraj, to accept that statement as correct, and refer the plaintiff to a regular suit to resume.

On the *first* of these points we observe that, though it is quite correct that the decision of 1807 is not binding on the plaintiff, the Judge has not gone on that ground; but he finds from other facts and considerations that the defendants are not liable to pay an enhanced rent for the lands which they have held for so many years at a uniform rate.

On the *second* point we think that the fact of the defendants being now in possession of lands under sunnuds which appear to be genuine, is sufficient to entitle them to resist the claim of the zemindar to assess them, unless the zemindar was in a position to show that the defendants had paid him rent on these lands. This evidence was not given, and therefore the order of the Courts below, referring the plaintiff to a regular suit for resumption, was quite correct.

On these grounds we dismiss the special appeal with costs.

The 18th March 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Jurisdiction—Ejectment.

Case No. 1241 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. O. Toogood, Judge of Cuttack, dated the 31st January 1863, affirming a decision passed by the Deputy Collector of that District, dated the 27th October 1862.

Maharajah Puddoolubh Deo (Plaintiff) *Appellant,*

versus

Obhoyram Singh and others (Defendants) *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Baboo Grish Chunder Ghose for Respondents.

Where a zemindar claims a right to enhance and evicts the ryot on his refusal to pay the enhanced rate, the Revenue Court has jurisdiction to try whether or not the ryot has been rightly evicted.

Steer, J.—WE find as well from the plaint as from the answer of the defendants that the plaintiffs hold the lands on the payment of a rent of Rs. 166. The defendant claims a right to enhance those rents; and on the plaintiffs refusing to pay at the rate demanded, he proceeded to evict them. In this state of the case the question is, Is it a suit to which Act X applies? We hold it is such a suit. The relationship of landlord and tenant clearly exists; and if on any ground the defendant considers himself entitled to demand an increase of rent, and the plaintiff does not agree to it, he still has no right to oust him; and if he does so, it is a matter for the Revenue Court to consider whether or not he has been rightly evicted.

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The defendant did not deny the jurisdiction of the Deputy Collector, and we hold that that officer, Nobin Kishto Sircar, has given very good reasons for entertaining the suit and for disposing of it by an order restoring the plaintiff to the possession of the lands which they held as tenants under the defendants.

In this view we see no ground for a special appeal, and we dismiss the application with costs.

The 22nd March 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Clause 5 Section 23 Act X of 1859—Forfeiture of lease—Sub-lease (what constitutes a).

Case No. 402 of 1863 under Act X of 1859.

Regular Appeal from a decision passed by Mr. J. H. Ravenshaw, Acting Collector of Maldah, dated the 30th July 1863.

Alum Chunder Shaw Chowdry and others (Plaintiffs) *Appellants,*

versus

Messrs. William Moran & Co. and others (Defendants) *Respondents.*

Baboos Kissen Kissore Ghose, Dwarkanath Mitter, and *Banee Madhub Banerjee* for Appellants.

Messrs. Doyne and *Fergusson* and *Baboo Juggadanund Mookerjee* for Respondents.

Suit laid at rupees 43,534-3.

In strict law a farmer forfeits his lease by the withdrawal of the personal security given by him at the time of taking the farm. But cases of forfeiture are not favored when no injury has resulted, or where a money compensation is a sufficient remedy.

Mere unpunctuality in the date of payment of rent is no ground for forfeiture. The zemindar, if endamaged by unpunctuality on the farmer's part, must sue for the interest due during the period in which the different instalments remained unpaid and for conditional forfeiture; but he cannot demand at once the absolute forfeiture of the property.

As to what constitutes a sub-lease, which, in contravention of a covenant not to sub-let, causes a forfeiture against which no relief can be granted.—HELD by Trevor, J. that the lessee must transfer to the sub-tenant all the rights which he himself has, not only of collecting the rents, but of suing for them in the Courts; Campbell, J. being of opinion that, although the sub-lease may not be so absolute and complete as to make the lease *ipso facto* void, yet it may be such a fraudulent evasion of the terms of the covenant as to entitle the plaintiff to equitable relief.

The mere fixing of a sum to be paid by the sub-tenant to the farmer, and the declaration of the sub-tenant's right to all sums collected beyond that amount, are not sufficient to convert an agency into a sub-lease.

Trevor, J.—PLAINTIFFS Alum Chunder Shaw Chowdry and others sue Messrs. Moran and Co., farmers, Messrs. Cumming and Clerk their agents, and Mr. Hedger, for the recovery of khas possession of mehal Raneehatee and for the cancelment of the lease which has become forfeited. Plaintiffs allege that the khas mehal lot Raneehatee belonging to Government was settled with Mr. Peter Macarthur, the former proprietor of Singa Tola factory, who took it in farm from 1263 to 1284, at an annual rent of Rs. 16,224-4-7, and gave security for the same; that the factory aforesaid was afterwards purchased by Mr. Moran who, as assignee, applied for and obtained a new lease from 1268 to 1282; and after depositing Government paper to the amount of 6,000 rupees as security, and executing a new kubooleut, obtained possession of the farm; that subsequently Government sold the khas mehal burdened with a sudder jummah of rupees 14,518, and it was purchased by them for rupees 30,150; that, as owners of the property, they now, under Clause 5 Section 23 Act X of 1859, sue for the ejectment of the defendant who has forfeited his lease by the following breaches of the covenant contained therein:—1*st*, inasmuch as he has withdrawn the Government security paper lodged with the Collector as security, subsequent to the sale of the property to plaintiff; 2*nd*, inasmuch as he has not paid his rents according to his kists; 3*rd*, inasmuch as he has committed waste on the property by the cutting down of trees; 4*th*, inasmuch as he has been collecting illegal cesses from the ryots; and 5*th*, inasmuch as he has granted a sub-lease to the defendant Hedger, contrary to the terms of the lease.

The defendants, Moran and Co., demur to the action, pleading that Clause 5 Section 23 Act X of 1859 is only applicable to ryots or cultivators, within which category they do not fall; and they deny that they have committed any breach of their covenants, alleging that the re-taking by them of the Government paper in deposit as security was done with the leave and licence of the Collector, and that their whole real and personal estate was liable for any arrears due by them; that they have paid their rents ever since the granting of the lease to them by Government in the same way that there are no arrears due, and that,

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under Section 78 Act X of 1859, plaintiff's claim is inadmissible; that they have never cut down any trees of the mehal producing fruit, neither have they levied any illegal cesses from the ryots; and lastly, they have never sub-leased the property to Hedger, who is simply their manager to collect the rents on a monthly salary of 50 Rs., an appointment which was made long before the purchase of the property by plaintiff, and was not objected to by the Collector.

The Collector was of opinion that the return of the security to the defendants was the act of the Collector, and the defendants could not be made liable for it, and that under any circumstances the withdrawal alone could not entitle the plantiff to eject the defendants; that, moreover, no arrear has been shown to exist against Messrs. Moran and Co.; and if one had existed, plaintiff could not eject, except a decree had been first obtained for the same, followed by non-payment of the sum decreed during 15 days subsequent to the date of the decree; that no satisfactory proof of the cutting down of trees, or the levying of illegal cesses from the ryots, had been produced. As to the allegation of the plaintiff that a sub-lease had been granted to Hedger by the defendants, the Collector was of opinion that that was not made out, no single document being offered in proof which bears Mr. Hedger's name as participating in any of the rights of a farmer.

From the decision of the Collector an appeal has now been preferred to this Court, and it has been contended before us that the acts pleaded in the first Court, with the exception of that of levying illegal cesses from the ryots, which has been withdrawn, are clearly proved on the record, and severally amount to a breach of the covenants in the lease rendering it liable to cancelment.

The plaintiff in this case is the assignee of Government, the original lessor, and he sues to re-enter and to eject the defendant, the lessee, by reason of a forfeiture occasioned by breach on his part of certain conditions subsequently specified in his lease. The breaches assigned are:—1*st*, the withdrawal by the defendant of a sum of Rs. 6,000 as Government security lodged in the hands of the Collector, the plaintiff's assignor, without the leave and licence of the plaintiff; 2*nd*, the non-payment of the rents due at the exact period mentioned in the kubooleut executed by the defendant; 3*rd*, the commissal by defendant of waste; 4*th*, the sub-leasing by defendant of his farm. These alleged breaches I will consider separately.

The defendant had, it appears, previous to the purchase of the property leased to the plaintiff, deposited in the hands of the Collector the sum of Rs. 6,000 in Government paper as security for the farm which he had taken. After the purchase of the property by the plaintiff, he petitioned the Collector for the sum, and that officer allowed him to take it from the treasury, remarking in his order that the liability arising from the act rested on the defendant. That liability, the plaintiff contends, is the forfeiture of the farm.

The personal security which is given by a farmer at the time of taking a farm in this country, is an essential portion of the transaction itself. The act, therefore, of the defendant amounts rather to a direct cancelment of the farm or the interest itself, than the breach of a condition subsequent, defeating the interest already created and still existing. It follows in this view that in strict law, the defendant has, by an unauthorized act, and in this case with his eyes open, forfeited his lease. But cases of forfeiture are not favored when no injury has resulted; and in cases in which the injury can be estimated and compensated in money, our Courts have, following the doctrine of English Courts of Equity, which doctrine has, in the matter of forfeiture for the non-payment of rent, been recognized by the local Legislature (*see* Section 78 Act X of 1859), given relief when, looking solely to the original intent of the parties in the case, they can give by way of recompense all that a party could in reason desire or expect. (Soloman *vs.* Walker, Tudor's Cases in Equity, Vol. 2, p. 786.)

Now in the case before the Court, the intent of the lessor in demanding, and the lessee in giving security, was simply to secure the punctual payment of the rent reserved. That has all been paid in the present instance, and security for the future alone is required. This can be obtained by a decree short of an absolute one for forfeiture, *viz.* by a decree for forfeiture, unless, within 15 days from the date of this decree, security, equal to that withdrawn without authority, be replaced. By a decree of this nature, the plaintiff will obtain all that he can in reason expect, and the relief which has been sanctioned by the Legislature in analogous cases is extended to a class of cases falling within the same principle, and

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requiring therefore the same mode of treatment.

The *second* breach assigned is the non-payment of rents at the exact period mentioned in the kubooleut executed by the defendant. It is not alleged by the plaintiff that there is any balance of rent due at the present moment, neither is it suggested that, in consequence of the laches of the defendant, plaintiffs have been obliged to pay sums of money from their own pocket, in anticipation of the receipt of rent from the defendant to save their estate from sale for arrears of revenue. Such being the case, we are clearly of opinion that mere unpunctuality in the date of the payment of rent is no ground for forfeiture. The Legislature, we have observed above, has recognized the doctrine that relief against forfeiture should be given in those cases in which a money compensation is a sufficient remedy, *viz.* in cases of the non-payment of rent. It follows that, if the plaintiff has by unpunctuality on the defendant's part been endamaged, he may sue for the interest due during the period in which the different instalments remained unpaid and conditional forfeiture, but he cannot demand at once the absolute forfeiture of the property.

As to the *third* breach assigned, the commissal of waste by defendant, no evidence of a trustworthy nature has been placed before us. We therefore proceed to a consideration of the *fourth* breach, *viz.* the sub-letting to the defendant Hedger.

The defendant's agent, Gocool Chunder Mullick, executed the kubooleut on behalf of Mr. Moran on the 11th June 1861. Previous to that date, *viz.* on the 28th May, Mr. Cumming, as agent for Moran and Co., had executed a sunnud in favor of Mr. Hedger. This sunnud, it is contended by plaintiff, though ostensibly appointing Hedger, manager only for Moran and Co., in reality is equivalent to a sub-lease; and by the execution thereof, the defendants have forfeited the lease at the very moment it was granted to them. As the granting of a sub-lease, in contravention of a covenant not to underlet inserted in a lease, causes a forfeiture against which no relief can be granted, it becomes necessary strictly to examine the terms of the sunnud granted by Moran's agent Cumming to Hedger. It recites that, having entrusted to Hedger the charge of the property alluded to in it, the grantor executes this sunnud requiring that he, (Hedger) should always be present on the property, and by good management and cultivation shew an increase in the assets; that at the end of every year, he should obtain the papers from the agents in the mofussil, who should account to him for the same, and then make them over to him, the grantor; that he should annually collect and remit to the grantor 17,600 rupees, out of which the revenue would be paid; that if any objection be raised on the score of having paid any money without the production of receipts, the same shall be inadmissible; that if, owing to neglect in the management, there occurs any kind of injury to the mehals, Hedger must be liable; that all transactions must be carried on according to the laws in force; and that, if acts are done in opposition to the same and litigation ensue, he must be liable; that with any sums that may be realized through his management in excess of rupees 17,600, the sum fixed, the grantor will have no concern; that so long as Hedger is capable of paying the fixed jummah of rupees 17,600 during the term of the ijara, the estate shall not be transferred to other hands, and that Hedger shall be allowed 50 rupees a month as a reward for his labor.

It is contended that this instrument is equivalent to a sub-lease: 1*st*, inasmuch as a fixed jummah is mentioned in it which the manager so called must pay to the farmer under all circumstances, and all beyond which is to be his own property; and 2*nd*, inasmuch as the whole legal responsibility of the management of the property is with the so called manager, who by the instrument has been completely installed in all the rights of the farmer.

But it appears to me that this contention will not hold water. In order to constitute a sub-lease, the lessee must transfer to the sub-tenant all the rights which he himself has, not only of collecting the rents, but of suing for them in the Courts. Now, in the present instance, this undoubtedly is not the case. By its terms, as between themselves, the manager becomes responsible to the farmer for any acts of negligence, and he is liable to third parties for any illegal acts. As to the former, he would be liable to the farmer for them as manager, had there been no mention of them in the instrument; and as to the latter, he would be also liable to third parties for illegal or tortious acts done beyond the scope of his authority as manager; but for all acts done by him as the agent of a disclosed principal, and within the scope of his authority, the principal under this instrument remains liable to third parties. Looking, therefore,

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solely to its terms, there seems to be no ground for the assertion that the farmer has by it relieved himself from all responsibility. Moreover, it has not been shewn to us in evidence that the manager has ever sued in any Court as a principal. I am therefore of opinion that the ground on which it is contended that the instrument amounts to a lease fails.

But it is contended also that the mere fixing of a sum, which under all circumstances the manager must pay to the farmer, and the declaration of the manager's right to all sums collected beyond that amount, is equivalent to a sub-lease. I am not aware of any law or rule of law which restricts the action of the agent and principal as between themselves. The collections under this agreement are made by the agent, and he and the principal divide them between themselves according to its terms. But this private arrangement, even if unusual, is not inconsistent with the real character of the parties. It is one which mutual convenience may have suggested, as it ensured to the farmer his rents, and by considerations of self-interest spurred on the agent to their prompt collection: but so long as the powers of the farmer are not transferred, and the agent must appear in Court as the agent of a disclosed principal, no arrangement, however unusual or eccentric as to the division of the rents when collected, is sufficient to convert an agency into a sub-lease.

I am therefore of opinion, looking to the instrument and to the period at which it was granted, that no ground exists for declaring the defendant's farm to be forfeited by reason of its terms.

Under the view of the whole case expressed above, I simply declare defendant's lease liable to be forfeited, unless, within 15 days from the date of this decree, he replaces in the Lower Court the sum of Rs. 6,000 in Government paper. Should he deposit the same duly endorsed to the plaintiff, the Lower Court will then deliver the paper to the plaintiff, appellant, who will then be placed in exactly the same situation as he was before the paper was withdrawn from the Collector by the defendant, respondent.

Under the particular circumstances of the case, each party should bear his own costs in both Courts.

Campbell, J.—I concur in the result of Mr. Justice Trevor's judgment and in all that he has said regarding the security and non-payment of rent. With respect to the alleged mutual sub-lease in evasion of the conditions, I have had much doubt. I agree in thinking that it is not so absolute and complete a sub-lease and transfer of rights and liabilities as to make the lease *ipso facto* void. I think, however, that it is such a fraudulent evasion of the terms of the covenant as would probably have entitled the plaintiff to equitable relief. But as plaintiff did not come in seeking relief in this form—as the deed in fraud of the covenant was not executed in his time—and as it is not shown in the record that Hedger is now in possession collecting the rents, and enjoying the benefits of the lease to the detriment of the estate, I do not see that plaintiff can now claim any other order than the refusal to declare the lease absolutely void on this ground. I therefore join in passing the decree as set forth in Mr. Justice Trevor's judgment.

The 30th March 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Plaint—Enhancement—Lease.

Case No. 523 of 1862.

Regular Appeal from a decision passed by the Officiating Collector of Backergunge, dated the 11th July 1862.

Hurro Soondery and others (Plaintiffs) *Appellants,*

versus

Muddun Mohun Dutt and others (Defendants) *Respondents.*

Baboos Kally Mohun Doss and *Oprokash Chunder Mookerjee* for Appellants.

No one for Respondents.

It is incumbent on a plaintiff in his plaint to state clearly the substance of his claim, *i. e.* the particular mode in which his claim arose as well as the amount of that claim.

Thus, where a plaintiff allowed the Court below to decide the case as if his contention was an ordinary case between a landlord suing to enhance and a tenant resisting his claim, and the statement of the defendant divulged the material circumstance of the case that the plaintiff's estate was let in farm, the High Court refused to allow the plaintiff in appeal to rest upon an alleged stipulation in a farming lease, the existence of which he altogether suppressed in the Court below, reserving to him the right of collecting from the tenantry an enhanced rent during the currency of the farming lease.

Trevor, J.—THIS is a suit for the enhancement of the rent for 1268 upon a cosut talook in the possession of the defendants.

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The defendants in their statement allege that they have always paid 133 rupees as the rent of their talook; that plaintiffs have let their estate in farm, and that they had paid the total rent of that year to the farmer.

The Officiating Collector found that the defendant's allegations were proved, and he therefore dismissed the plaintiff's suit with costs.

The plaintiff now appeals to this Court, urging that, as in the lease between his farmer and himself, there was a stipulation reserving to him the right of collecting from the tenantry an enhanced rent during the currency of the farming lease, leaving to the farmer only the right of collecting the amount of rents which had, up to the date of the lease, been paid by the tenants, the Collector should have acted upon this stipulation and decreed to him his present claim.

We think that it was incumbent on the plaintiff in his plaint to have stated clearly the substance of his claim, that is, he should have stated the very particular mode in which his present claim arose, as well as the amount of that claim, and not have allowed the Court below to decide the case as if the contention of the plaintiff were an ordinary case between a landlord suing to enhance and a tenant resisting his claim. The statement of the defendant has, it is true, divulged the material circumstance of the case, *viz.* that the estate of the plaintiff is let in farm, but we cannot allow the plaintiff in appeal now to rest upon an alleged stipulation in a farming lease, the existence of which he altogether suppressed in the Court below.

Whether, under any circumstances, a stipulation like that pleaded by the plaintiff could be enforced against the tenants, in other words, whether the landlord can assign a portion of his rights by way of farming lease, reserving the remainder, thus severing the landlord's interest, and making the tenant liable to pay rent to two parties holding under the same title and, in the eye of the law, the same persons, during the currency of the lease; and also whether, as between the zemindar and the farmer in this country, the stipulation could be enforced, it seeming to be inconsistent with and repugnant to the interests to which in the present instance it is annexed, are questions which we decline to decide in the present case.

The appeal is dismissed with costs.

The 30th March 1864.

Present:

The Hon'ble H. T. Raikes and W. S. Seton-Karr, *Judges.*

Appeal—Section 26 Act X of 1859.

Case No. 1815 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 20th March 1863, reversing a decree passed by the Deputy Collector of that District, dated the 31st August 1862.

Deendyal Augusti (Defendant) *Appellant,*

versus

Messrs. Robert Watson and Co. (Plaintiffs) *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* for Respondents.

Quære.—Whether the appeal from an order of a Collector under Section 26 Act X of 1859 lies to the Judge or to the Commissioner.

Raikes, J.—THIS case was heard and determined under Section 26 Act X of 1859 by the Deputy Collector, and afterwards in appeal by the Judge. The plea taken in special appeal is that the Judge had no jurisdiction to try the appeal.

We admit that the late Sudder Court held that the appeal from an order of the Collector under Section 26 should not be entertained by the Zillah Judge; but when the respondent in this appeal preferred his appeal to the Judge, no objection was raised by the special appellant; and as the ruling of the late Sudder Court regarding appeals under Section 28 of Act X of 1859, which was passed on grounds applicable to appeals under Sections 26 and 27, has been superseded by a Full Bench of the High Court, it seems to us a question whether appeals under Section 26 should be heard by the Commissioner. There appears to us to have been no error in the judgment of the Lower Appellate Court, and if we overthrow that judgment, there is no way of directing an

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appeal elsewhere. We moreover do not think that the ends of justice require us to interfere in the present appeal.

We therefore dismiss the appeal, leaving each party though to pay his own costs in this Court.

The 31st March 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp,

Judges.

Enhancement — Presumption under Section 4 Act X of 1859.

Case No. 1522 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 24th February 1863, *affirming a decision of the Assistant Deputy Collector of that District, dated the 29th September* 1862.

Ramkishen Sircar and others (Plaintiffs) *Appellants,*

versus

Meeah Deler Alli and others (Defendants) *Respondents.*

Baboos Bhoobun Mohun Roy and *Ramanath Bose* for Appellants.

Baboos Dwarkanath Mitter and *Banee Madhub Banerjee* for Respondents.

In a suit for enhancement, if the defendant relies not on the fact that he had held at an unvaried rent from the time of the Permanent Settlement, but upon a pottah granted long after that time, his own defence rebuts any presumption which might arise from a 20 years' uniform payment of rent.

Kemp, J.—We think that the Judge was wrong in holding that the defendant was entitled to the presumption which arises under Section 4 Act X of 1859.

The suit was for enhancement. The defendant did not rely on the fact that he had held the land at a rate of rent which had not been changed from the time of the permanent settlement, but upon a pottah alleged to have been granted in 1204, which is admittedly long after the perpetual settlement. His own defence, therefore, rebutted any presumption which might arise from the fact of his having paid rent at a uniform rate for twenty years.

The decision of the Judge must therefore be reversed, and the case remanded in order that the Judge may fix what is a fair and equitable rate of assessment.

With reference to the 3½ beegahs claimed to be held rent-free by a sunnud of 1178, there must be enquiry and a finding, as the Judge has altogether omitted to notice this point.

The 31st March 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp,

Judges.

Suit for kubooleut at enhanced rate—Notice.

Case No. 1762 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 2nd April 1863, *reversing a decision passed by the Deputy Collector of that District, dated the 19th December* 1862.

Tarinee Churn Bose and others (Plaintiffs) *Appellants,*

versus

Kashinath Singh (Defendant) *Respondent.*

Baboo Woopendro Chunder Bose for Appellants.

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Baboo Greeja Sunkur Mozoomdar for Respondent.

A notice is not necessary as a preliminary process before a suit for a kubooleut at an enhanced rate can be instituted; the suit itself is a notice.

Kemp, J.—THIS was a suit for a kubooleut at a higher rate than had hitherto been paid. It is admitted that the defendant is the tenant of the plaintiff, whether he holds more or less land than is alleged by the plaintiff. The relationship of landlord and tenant being established, we are of opinion that a notice is not necessary as a preliminary process before a suit for a kubooleut can be instituted; indeed, the suit itself may be said to be a notice.

In the present case it appears to us that the defendant had hitherto held 11½ cottahs of land, paying a jumma of Re. 1-14 per mensem. It is alleged in the plaint that the defendant holds more land than he originally did; and that he promised to pay Rs. 4-8 per mensem. The demand for a kubooleut is based on that promise.

The Judge, instead of deciding the case upon the pleas raised by the parties on admission of the defendant's tenancy (whether he holds more or less land than is alleged in the plaint), and what may be the proper rent for which he is liable supposing him to hold more land, has proceeded to try the suit upon an issue which does not arise in the pleadings, *i. e.* whether defendant has a right of occupancy or not, a fact not questioned by either party, and rules that, where there is no right of occupancy, there is no necessity for a notice of enhancement.

We remand this suit that the Judge may try the proper issue, which is, whether the plaintiff is entitled to a kubooleut on the grounds upon which he claims it, *viz.* that the defendant is tenant, occupies more land than he formerly did, and promised to execute a fresh lease for the same. In trying this issue, the Judge will also enquire whether the plaintiff tendered to the defendant a pottah under Section 9 Act X.

The 31st March 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Enhancement — Service tenure (at nominal rents.)

Case No. 1506 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 18*th March* 1863, *affirming a decision passed by the Deputy Collector of that District, dated the* 30*th June* 1862.

Chunder Nath Roy (Defendant) *Appellant,*

versus

Bheem Sirdar and others (Plaintiffs) *Respondents.*

Baboos Kishendyal Roy and *Girja Sunker Muzoomdar* for Appellant.

Baboo Ishur Chunder Chuckerbutty for Respondents.

The mere fact of a long prior possession of a service tenure on no rent at all gives the holder no exemption from the payment of rent when the service is no longer required or performed.

Steer, J.—THE defendant served the plaintiff with a notice to pay him a proper amount of rent or to give up the land.

The plaintiff brings this suit to try his liability to pay an enhanced rent, or to be evicted.

It has been found by the Lower Court that the plaintiff holds on a service tenure, and that he has so held for 200 years on the same terms as to the amount of rent, which is nominal in amount.

The Judge holds that, as plaintiff has held the lands for 200 years, the defendant has

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no right to oust him from the lands, or to interfere with them.

This decision amounts to a finding that the plaintiff is not either liable to enhancement or to be turned out.

It is contended that a 200 years' possession at a nominal rent on a service tenure gives the plaintiff no right of occupancy, unless he is willing to pay the amount of rent demanded; and allowing the plaintiff to have a right of occupancy, the defendant has a right to obtain from him a proper amount of rent, either at the defendant's own rates, or at the rates of the pergunnah.

We find from a perusal of the plaint that the plaintiff states that he would have been subject to pay at the rate of 6 annas a *pakee* for his lands, but that rent was remitted on account of the service he performed. Therefore, the Judge was not warranted in finding that he paid a pepper-corn rent, and where the Judge found it is not apparent in any of the papers.

The Judge is clearly wrong therefore in this finding, and the mere fact of a long prior possession of a service tenure on no rent at all gives the holder no exemption from the payment of rent when the service is no longer required or performed.

The plaintiff is willing to pay some amount of rent, and the defendant is not unwilling, as the terms of his notice show, to allow the plaintiff to continue in occupation, provided he agrees to pay a fair rent.

We, accordingly, remand the case that the Lower Court may enquire and decide what is a fair and proper rate of rent.

The 31st March 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Assessment of excess lands—Section 17 Act X of 1859.

Case No. 1508 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. J. E. S. Lillie, Officiating Judge of Hooghly, dated the 18th February 1863, modifying a decision of Gopal Chunder Mookerjee. Deputy Collector of Serampore, dated the 27th September 1862.

Bipro Doss Day and another (Plaintiffs) *Appellants,*

versus

Mussamut Sakermonee Dossee (Defendant) *Respondent.*

Roy Sreenath Sen and *Baboo Nil Madhub Bose* for Appellants.

Baboo Kedarnath Chaterjee for Respondent.

Lands in excess of the area recorded in a mokurree pottah containing no boundaries, are liable to assessment under Section 17 Act X of 1859.

Kemp, J.—The Judge has found that the mokurree pottah of the defendant is a *bonâ fide* document; and with this finding we cannot interfere in special appeal. But it is admitted that this pottah does not contain any boundaries, and that the area recorded in the pottah is 3 beegahs 14 cottahs. Now it has been found by measurement that the area in the occupation of the defendant is 6 beegahs 10 cottahs, or 2 beegahs 12 cottahs in excess of the area recorded in the pottah. The plaintiff is therefore entitled to assess the excess under the provisions of Section 17 Act X of 1859. The case is therefore remanded, in order that the Judge may decide what is a fair and equitable rate for the excess lands. Costs to follow the result.

The 31st March 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Enhancement—Pleading—Forged document.

Case No. 1509 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. J. E. S. Lillie, Officiating Judge of

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Hooghly, dated the 20th February 1863, *reversing a decision of Mr. C. B. Garrett, Deputy Collector of Howrah, dated the 30th October* 1862.

Gooroo Doss Ghose (Defendant) *Appellant,*

versus

Sristee Dhur Dey (Plaintiff) *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboos Baney Madhub Banerjee and *Kadarnath Chatterjee* for Respondent.

Where a defendant sets up a deed as exempting him from liability to pay a certain enhanced rent, he is not at liberty to fall back on his right to hold at fair and equitable rates, when the Court finds his deed to be a fabrication.

Steer, J.—THE plaintiff sued to enhance. The first Court found the defendant's mokurree pottah to be a true and valid one, and dismissed the suit. The Judge finds the pottah to be false, and decrees for the plaintiff.

In the appeal by the defendant it is contended that, though it has been found that the defendant is liable to enhancement, the rates of rent ought to be ascertained; and that it is not equitable, without a prior enquiry as to the fairness of the rates, to decree whatever rate the plaintiff may choose to demand.

We think that, where a defendant sets up a deed as exempting him from liability to pay a certain enhanced rent, he is not at liberty to fall back on his right to hold at fair and equitable rates, when the Court finds his deed to be a downright fabrication. He has chosen to rest his case on a forged document, and he must stand or fall by it. Therefore, if he is not willing to pay the rent demanded, he must quit.

We, accordingly, dismiss the special appeal with costs.

The 31st March 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Suit for rent—Relationship of landlord and tenant.

Case No. 1521 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 23rd February 1863, *reversing a decision of the Deputy Collector of that District, dated the 30th October* 1862.

Mahomed Assun Chowdry (Plaintiff) *Appellant,*

versus

Kristo Soonder Talookdar and others (Defendants) *Respondents.*

Baboo Samachurn Banerjee for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

Before arrears of rent can be recovered in a suit under Act X of 1859, the plaintiff must establish the fact that the defendant holds a tenure under him.

Steer, J.—THE plaintiff sues for arrears of rent for 11 years and 8 months, on a tenure which he calls a putnee. The yearly rent he states to be Rs. 101. The total rents, he says, are 1,186 Rs., of which he says he received Rs. 500, and the balance sued for is Rs. 1,032.

The defence is that the defendant does not hold any tenure within the plaintiff's zemindaree; that he does hold a tenure which is an independent one, and pays its rent direct to the Collector, and that its rent is Rs. 91.

The Deputy Collector found that the tenure was not a putnee; nor was it a tenure paying rent to the Government direct. He says that, as the tenure is not rent-free, therefore it is presumable that the rents are payable to the zemindar. He accordingly finds that the rent is Rs. 91, at which rate he awards the

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arrears, *minus* the rents allowed to have been received for 11 years and 8 months.

The Judge seems to hold that, inasmuch as the plaintiff has failed to prove that the defendant holds a tenure under him, he is not entitled to recover any rents from him.

We find that the Deputy Collector's presumption that the plaintiff was entitled to the rent is not warranted; and, as the Judge has held that the plaintiff has failed to establish the relation of landlord and tenant as between him and the defendant, we think the decision of the Judge, refusing to decree any arrears, is just and correct. Moreover, from the nature of the case, we think the suit is one which, under the color of arrears of rent, is intended to raise the question whether the talook, call it putnee or not, is within the plaintiff's zemindaree.

We accordingly dismiss the special appeal with costs.

The 31st March 1864.

Present:

The Hon'ble C. Steer and F. B. Kemp, *Judges.*

Suit for rent—Relationship of landlord and tenant.

Case No. 1515 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 13th February 1863, reversing a decision of the Deputy Collector of that District, dated the 27th September 1862.

Nauth Tagore (Defendant) *Appellant,*

versus

Mussamut Luchmee Kooer and others (Plaintiffs) *Respondents.*

Baboo Kissen Succa Mookerjee for Appellant.

Baboo Debender Narain Bose for Respondents.

Until the relationship of landlord and tenant is established between the parties, a suit for rent cannot lie under Act X of 1859.

Kemp, J.—We think that this suit has been tried on a wrong issue. The plaintiff sued, averring that he was the ticcadar of certain shares of the disputed mouzah, and that the defendant was a tenant cultivating beegahs 14-15 of land at a jumma of Rs. 33-12-9. The balance alleged to be due was Rs. 153-2 from 1258 to 1260 Fuslee.

The defendant answered, denying his being a tenant of the plaintiff, and urging that he was malik of a 2 as. 9 pie share of the nizamut puttee, and further that he had given no ticca lease of his share to the plaintiff.

The Court of first instance dismissed the plaintiff's claim. In appeal the Judge below has held that it has been distinctly shewn that the lands are situated in the nizamut puttee, of the 8 annas of which the plaintiff has, by defendant's admission, an 8 annas lease, and further that the putwaree was Addy Loll, and not Dataram.

We cannot find that the defendant admitted that the plaintiff had a ticca lease of his, the defendant's, share in the nizamut puttee. It may be that the whole estate was divided into two puttees, known by the names of khas and nizamut puttees, and that the lands in dispute have been deposed to belong to the latter division. But the defendant distinctly denies tenancy, and sets up an independent right as zemindar or malik, and further denies having given the plaintiff a lease. Until, therefore, the relationship of landlord and tenant is established between the parties, the suit for rent will not lie.

We remand the case for the Judge to try the issue which arises on the pleadings, *viz.* whether the defendant is the tenant of the plaintiff or not. We think that the Judge should have stated the case more clearly, and have given more intelligible reasons for the conclusions at which he arrived.

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The 1st April 1864.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Arbitration.

Case No. 1554 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Sarun, dated the 24th February 1863, *affirming a decision passed by the Deputy Collector of that District, dated the 26th September* 1862.

Bhrigoo Roy and others (Defendants) *Appellants,*

versus

Bhagruth Upadhya and others (Plaintiffs) *Respondents.*

Baboo Anund Gopal Paulit for Appellants.

Mr. John Baptist and *Moonshee Ameer Ali* for Respondents.

The application for a reference to arbitration must be made in Court by an instrument in writing by the parties in person or their pleaders specially authorized in that behalf.

Kemp, J.—THE only point taken is that the parties were willing to entrust their differences to arbitration, and that the Collector should have permitted them to do so. The Judge finds that no such application was made. Without deciding whether the parties to a suit for rent under Act X can ask a Collector to refer their differences to arbitration, we find that no formal application was made by the parties. The Ameen who was sent to make a local enquiry, reported that the parties wished to submit to arbitration, and had named arbitrators. The Collector's orders were asked. This report appears to have been filed with the record. The application for a reference to arbitration must be made in Court by an instrument in writing by the parties in person, or their pleaders specially authorized in that behalf (*see* Section 313 of the Code); so that, even admitting that a suit under Act X can be referred to arbitration, no formal application has been made.

The appeal is dismissed with costs and interest.

The 1st April 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonauth Pundit, *Judges.*

Enhancement—Sharer—Partition.

Case No. 767 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. G. Bright, Officiating Judge of the 24-Pergunnahs, dated the 31st December 1862, *affirming a decision of Moulvie Fakeer Ahmed Khan, Deputy Collector of that District, dated the 29th October* 1862.

Troylochotaran Chowdry and others (Plaintiffs) *Appellants,*

versus

Muthoora Mohun Dey and others (Defendants) *Respondents.*

Baboo Opendro Chunder Bose for Appellants.

No one for Respondents.

One of several joint proprietors of an estate may maintain a suit for enhancement of his share of the rent without a butwara.

Morgan, J.—THE Lower Courts have held that one of several joint proprietors of an estate cannot maintain a suit for enhancement of his share of the rent, unless there has been a butwarra. But it has been decided that one of several proprietors may maintain such a suit in respect of his share. (*See* Judgment of this Court, dated 12th March 1863, in Special Appeal No. 5 of 1863.)*

We reverse the judgments of the Lower Courts, and remand the case to the Court of first instance for trial.

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* The 12th March 1863.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Peacock, C. J.—THE question in this case is whether one of several joint proprietors of an estate can raise the rent of a ryot as to his portion of the property. The case which was cited (a ruling of this Court dated 17th September last) is not in point, the facts set forth in the decision there being different from the facts in the present case. In the case cited it was held that one of several shareholders of a joint undivided estate was not entitled to sue for enhancement of rent of a specific portion of the land held by a ryot within the estate. We think, however, that one shareholder of a joint estate, provided there is no pottah and nothing to preclude enhancement, would have a right, after giving a notice at a proper period of the year, to sue for an enhancement of the rent of his share. The notice in this case was substantially to that effect. The plaintiff says that he holds a two-thirds share in the property; that the proper rent of the whole is 70 rupees; and that he claims two-thirds of 70 rupees for his share. In the

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The 5th April 1864.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice.*

Jurisdiction—Suit for rent (as between co-sharers)—Partition.

Case No. 453 of 1863 under Act X of 1859.

Application for a review of Judgment passed by the Hon'ble Sir Barnes Peacock, Kt., Chief Justice, and the Hon'ble L. S. Jackson, Judge, on the 20th March 1863, in Special Appeal No. 508 of 1862.

Syed Hyder Ali, *Petitioner,*

versus

Omrit Chowdry and others, *Opposite Parties.*

Mr. T. T. Forbes for Petitioner.

Where several joint proprietors of an estate agreed that if, before partition, cultivation should take place by any of them, he should pay rent at a certain rate,—HELD that a suit would not lie under Act X of 1859 against such shareholder by another shareholder for the latter's share of such rent, whether there be dispute or not as to the amount of the respective shares.

THERE is no ground for review in this case. The Court has already stated its reasons in the judgment which has been delivered. This is clearly not a suit for rent within the meaning of Act X of 1859. Several persons having a right to an estate, agreed to appoint referees to partition it amongst them, and agreed that, if cultivation should not take place on behalf of the maliks before the settlement of the partition, no mutual claim for loss of rent should be made; but that, if cultivation should take place before partition by any of the parties, such party should pay rent at the rate of Rs. 4-10 a beegah. But the Rs. 4-10 a beegah was to go to the whole of the shareholders. In this case the defendant was one of the shareholders, and entitled to his proportion of Rs. 4-10 a beegah, which, by virtue of the arrangement, he was to pay for the land which he cultivated. The claim of the plaintiff is, therefore, founded upon the special agreement to compel the defendant to pay to him such a proportion of Rs. 4-10 a beegah of the land cultivated by the defendant as shall be equal to the plaintiff's share of the estate. It will be necessary, therefore, in this suit to ascertain what were the respective shares of the different shareholders, including the plaintiff and defendant. Although it is said that there is no dispute in this suit as to the amount of the respective shares, that fact cannot alter the nature of the claim. If it is a suit for rent because the shares were admitted, it would equally be a suit for rent if the shares were disputed, and in that case the Collector would have to enter into the question of title, to ascertain what share each of the proprietors is entitled to.

The plaintiff's remedy, therefore, is in the Civil Court.

The 5th April 1864.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Sumboonauth Pundit, *Judge.*

Abatement of rent (for land washed away)—Tenants holding on after lease.

Case No. 2052 of 1862 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. B. Simson, Officiating Judge of Purneah, dated the 12th June 1862, affirming a decision of the Deputy Collector of that District, dated the 24th June 1861.

Sheik Enayutoollah and others (Plaintiffs) *Appellants,*

versus

Sheik Elaheebuksh and others (Defendants) *Respondents.*

Baboo Ramgopal Ghose for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

A tenant, whether with or without a right of occupancy, is entitled to abatement of rent for land washed away, unless precluded by the terms of his kubooleut from claiming that abatement.

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case cited, the plaintiff claimed enhancement of rent in respect of a specific portion of land.

If such a demand were admissible, a man entitled to a ⅓rds share might select as his share the best land in the estate, and claim as an enhanced rent for his share that which would be a fair and equitable rent for that portion of the estate.

We think, therefore, that, where there is no pottah, one shareholder may enhance the rent *quoad* his share, by giving notice of enhancement at a proper period of the year. In this case, however, four pottahs were set up, by which the tenants claimed to hold on payment of a fixed rent. The case must, therefore, be remanded to the Court of first instance, to try whether the pottahs set up by the defendants are genuine, and, if they are, then to determine whether they preclude enhancement of rent. If the pottahs are not proved, or do not preclude enhancement, then to ascertain what is a fair and equitable rate of rent for the whole of the lands held by the defendants, not exceeding the rate specified in the notice of enhancement, namely, 70 rupees; and to award to the plaintiff his proper share of what may be determined to be a fair and equitable rate for the whole of the said land.

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Where a tenant holds on after the expiration of a lease, he does so at the same rent and on the same terms and stipulations as are mentioned in the lease, until the parties come to a fresh settlement.

Peacock, C. J.—In this case the appellant sues for an abatement of his rent, upon the ground that a part of his land had been washed away, and that a part of it had been covered with sand, from which we understand that it was so covered with sand as to have been rendered wholly useless. The Judge says that, inasmuch as the tenant held under a lease, he is not entitled to abatement. The Judge says :—" The appellant took a lease for 3 years. In the last year of that lease, 1267, he states that diluvion occurred. Section 18 of Act X of 1859 only entitles ryots having rights of occupancy, to abatement of rent. The appellant can resign or make a fresh settlement, but he has no right to enquire into diluvion and abatement of rent."

It is alleged in the plaint that the plaintiff has a right of occupancy, but the Judge has not determined that question. He seems to have determined that a tenant is not entitled to an abatement of rent because he held under a kubooleut. We think that, whether he was a tenant having a right of occupancy or not, he was entitled to abatement for the land washed away, if the terms of the kubooleut were not such as to preclude him from claiming that abatement. Although Section 18 Act X of 1859 is confined to ryots having a right of occupancy, yet that Act was not intended to take away any right which existed by law, independently of the Regulations thereby repealed; and if, before the passing of that Act, a tenant not having a right of occupancy, was entitled to abatement for any part of his land washed away, it was never intended by Act X of 1859 to take away that right. In England it is clear that, if a portion of a tenant's lands be washed away, he is entitled to have an abatement of his rent *pro tanto*. The rule is very clearly laid down as follows in Bacon's Abridgment, 7th Edition, Vol. VII, p. 63, under the title "Rent," and under the head, " In what cases rent may be apportioned by the act of law, or by the act of God." It is there said:—

" In this place we are to consider whether the tenant shall pay the whole rent, though part of the thing demised be lost, and of no profit to him, or though the use of the whole be for some time intercepted, or taken away without his default; and here it seems extremely reasonable that, if the use of the thing be entirely lost or taken away from the tenant, the rent ought to be abated or apportioned, because the title to the rent is founded upon this presumption, that the tenant enjoys the thing during the contract; and, therefore, if part of the land be surrounded or covered with the sea, this being the act of God, the tenant shall not suffer by it, because the tenant, without his default, wants the enjoyment of part of the thing which was the consideration of his paying the rent; nor has the lessee reason to complain, because, if the land had been in his own hands, he must have lost the benefit of so much as the sea has covered."

We think that that rule is founded on the principles of natural justice and equity, that if a landlord let his land at a certain rent to be paid during the period of occupation, and the land is, by the act of God, put in such a state that the tenant cannot enjoy, the tenant is entitled to an abatement. The first question then is, whether there was any stipulation in the kubooleut, which precluded the tenant from claiming abatement, if, by the act of God, any portion of his land were washed away. At the foot of the kubooleut there is a memorandum to that effect, but the Judge has not found that memorandum to be a part of the kubooleut.

The case must, therefore, go back to the first Court to try upon the merits, whether the kubooleut contained any stipulation that the tenant should not have an abatement, if part of the land should be washed away. The very fact of a lease containing such a stipulation shows that the parties considered that, without that stipulation, the tenant should not pay rent for any part washed away, in accordance with the principle of the rule to which we have referred. If the Judge find that, according to an express stipulation in the kubooleut, the tenant is not entitled to any abatement by reason of any part of the land being washed away by the act of God, then the tenant is not entitled to abatement during the term of that lease.

But it is said that the lease is at an end, and that the tenant is entitled to abatement, notwithstanding the expiration of that lease. We think that, when a tenant holds on after the expiration of a lease, he does so on the terms of the lease, at the same rent, and on the same stipulations as are mentioned in the lease, until the parties come to a fresh settlement. Therefore, if by the kubooleut it was stipulated that there should be no abatement if a part of the land should be washed away, the tenant continued bound by that stipula-

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tion, notwithstanding the expiration of the lease.

If the Judge find that the terms of the kubooleut do not preclude the tenant from claiming an abatement in proportion to the land washed away, the case will have to be tried upon the merits, whether any portion of the land was washed away, and whether any portion of it was subsequently regained, because on that will depend whether the tenant is entitled to any and what abatement. If the land was re-formed, the abatement would cease from the time the regained land became as good as it was before; if it was not so good, the tenant would be entitled to an allowance for the injury done by the act of God.

With regard to the land alleged to have been covered by sand, the Judge of the first Court will have to enquire if that portion was covered by sand, and thereby deteriorated, or rendered wholly useless; because if the land has been deteriorated, or rendered wholly useless by the act of God, the tenant would be entitled to an abatement, provided there was no stipulation to the contrary in the kubooleut.

The Judge of the first Court will also enquire whether, by virtue of any subsequent arrangement come to between the landlord and tenant, the tenant is entitled to an abatement. If there was any express agreement between the parties, the tenant is entitled to the benefit of that agreement, and must be considered to have held over, according to the terms of the arrangement thereby made.

The 5th April 1864.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Sumboonath Pundit, *Judge*.

Suit for Kubooleut—Tender of Pottah—Assessment of rent (on land encroached upon).

Case No. 2137 of 1862 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 7th June 1862, *affirming a decision of the Assistant Collector of that District, dated the 12th July* 1861.

Doorga Kant Mozoomdar (Defendant) *Appellant*,

versus

Bisheshur Dutt Chowdry and others (Plaintiffs) *Respondents*.

Baboo Onookool Chunder Mookerjee for Appellant.

Baboos Banee Madhub Banerjee and *Oprokash Chunder Mookerjee* for Respondents.

Before a landlord can sue for a kubooleut, he must tender a pottah. But the objection that a pottah had not been tendered, should be made in the first Court or in the Lower Appellate Court, and not for the first time orally in special appeal.

A landlord cannot sue for a kubooleut in respect of a portion of the land held under an istemraree pottah.

If a tenant mixes up land upon which he has encroached with his rightful holding, and cannot show which is his own and which the encroachment, the presumption is that he has encroached upon the best land.

Peacock, C. J.—In this case the plaintiff sued for a kubooleut for 167 beegahs. The defendant pleaded that he had only got 144 beegahs 3 cottahs, and that he held them under an istemraree pottah, at a rent of Rs. 40-12. It is said that the plaintiff had no right in this case to sue for a kubooleut, inasmuch as he had not tendered a pottah. It is mentioned in Section 9 Act X of 1859 that "the tender to any ryot of a pottah, such as the ryot is entitled to receive, shall be held to entitle the person to whom the rent is payable to receive a kubooleut from such ryot." This shows that it is necessary that, before a person sues for a kubooleut, he should tender a pottah. But no objection was made in the first Court, nor in the Lower Appellate Court, that a pottah had not been tendered. Although the objection was not included in the grounds of appeal before this Court, we allowed the party to urge the objection. But we are of opinion that he ought not to be allowed to avail himself of the objection now.

The next question is whether the plaintiff can sue for a kubooleut for 161 beegahs when the defendant holds an istemraree pottah for 144 of those 167 beegahs. We think that the plaintiff has no right to sue for a kubooleut in respect of a portion of the land held under an istemraree pottah. Although Act X of 1859 provides that a person may sue for a pottah, it means that he may do so whenever he has not got a pottah, but not when he has already got one, otherwise there would be no end of applications by parties already in possession of pottahs. We are of opinion that the landlord was not entitled to demand a kubooleut for the lands included in the istemraree pottah at a rent exceeding that reserved by the pottah. The tenant was not bound to execute a kubooleut for the lands mentioned in the istemraree pottah, for it might have destroyed his title, shewing that his was not

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an istemraree pottah. We, therefore, think that the plaintiff was not entitled to sue for a kubooleut for the 144 beegahs 3 cottahs.

The next question is, was the plaintiff entitled to sue for a kubooleut for the 23 beegahs not included in the istemraree pottah. We think that he would have been so entitled, if he had tendered a pottah for those 23 beegahs; and as the objection cannot be raised now, we think that he is entitled to a decree for a kubooleut for 23 beegahs.

Section 81 Act X of 1859 enacts:—"When a decree is given for the delivery of a kubooleut, if the person required by the decree to execute such kubooleut shall refuse to execute the same, the decree shall be evidence of the amount of rent claimable from such person, and a copy of the decree under the hand and seal of the Collector shall be of the same force and effect as a kubooleut executed by the said person." The Court in this case was wrong in awarding a kubooleut for the whole 167 beegahs. The Court ought not to have ordered a kubooleut for the 144 beegahs 3 cottahs included in the istemraree pottah, but merely a kubooleut at a fair rent for the 23 beegahs not included in the istemraree pottah. If the kubooleut ordered be not executed, the decree will have the effect of a kubooleut for the 23 beegahs at that rent.

The only remaining question is whether the rent fixed for the 23 beegahs is a proper rent. It is found that the defendant had held the 144 beegahs 3 cottahs at a fixed rent from the time of the Permanent Settlement. When the plaintiff came in as an auction-purchaser, he found the defendant in possession of 167 beegahs. The defendant set up that he had got an istemraree pottah for 144 beegahs 3 cottahs, and he said that he had only that quantity in possession. It is said that the rent for the 23 beegahs has been fixed upon a wrong principle. There are two classes of land, pollee and kher land, within this holding of 167 beegahs; and the defendant says, how can it be ascertained how much there is of pollee land (which is of a better quality than the other), and how much of kher. The Deputy Collector has adjusted the rent in this way. He says that it is impossible to find out now the boundaries of the istemraree lease, and the Judge upholds that finding. We cannot, therefore, say how much land is pollee, and how much kher. The plaintiff said that, out of 167 beegahs, 62 beegahs were pollee, and that was not denied by the defendant. The Deputy Collector, therefore, said that, as the whole quantity of 167 beegahs contains 62 beegahs of pollee land, he would assume that the 23 beegahs, which are not included in the istemraree pottah, contains the same proportion of pollee land as 167 bears to 62. He accordingly fixed the rent upon the assumption that the 23 beegahs contained 8 beegahs of pollee and 15 of kher land, awarding the former at Re. 1-8 per beegah, and the latter at 12 annas per beegah. It is not alleged that he has given too much; but the contention is that, inasmuch as the Deputy Collector has given 8 beegahs of pollee, and 15 beegahs of kher land, without holding any enquiry into the rate and quantity of the two descriptions of land, his decision is wrong. If we were to send the case back, the parties would not be any forwarder; and we see no better way of doing justice in the case than by following the course taken by the Deputy Collector.

But, even if the principle of the Deputy Collector's decision were wrong, there would be no ground for reversing it on the application of the defendant. If the defendant held under an istemraree lease, he ought to have known the boundaries of the land included in the lease, and had he known it, he would have known the boundaries of the 23 beegahs which were some time or other added to that land. But if he took a lease of the 144 beegahs 3 cottahs, and the 23 beegahs without describing the boundaries, he has, in fact, mixed up the land upon which he has encroached with his rightful holding. If a man encroaches and cannot show which is his own and which the encroachment, it might be assumed that he had encroached upon the best land, in the same way as a man who takes property from another, and does not produce it, may be presumed to have taken property of the best quality. There is a case in which a boy finding a diamond took it to a jeweller to know what it was. The jeweller took the diamond, and refused to return it. On being sued for it, he was obliged to pay for a diamond of the best water. If a person encroaches upon another's property, and cannot point out which is his own, it is his own fault if he suffers. The Deputy Collector might have been justified in assessing the defendant for 23 beegahs of pollee land. But, instead of doing that, he assumed the 23 beegahs to contain pollee land only in the same proportion as the whole 167 beegahs bore to 62; and we think that the Deputy Collector took a very fair and reasonable view under the peculiar circumstances of the

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case, in consequence of the acts of the defendant himself, either from negligence or by wilful encroachment. The fault may have been that of the original zemindar. But the plaintiff is an auction-purchaser, and does not know anything about it.

On the whole we think that the decision of the Judge must be amended by awarding to the plaintiff a kuboolent for the 23 beeghs, at the rent fixed by the Deputy Collector, and affirmed by the Judge.

The objections filed by the plaintiff, special respondent, must be overruled. The first Court acted upon the receipts as proof of payment at an uniform rate for the last 20 years, within the meaning of Section 4 Act X of 1859. That being so, if the plaintiff had intended to object to that finding upon the receipts, upon the ground that they were not legal evidence, he ought to have made that objection a ground of appeal before the Judge below. Instead of that, he goes before the Judge without making any such objection, and the Judge acts upon the receipts instead of rejecting them Under these circumstances we cannot, in special appeal, entertain such an objection.

But for the special respondent's cross-objections, we should have awarded to both parties costs in proportion to the amounts allowed and disallowed. But the special respondent having filed an objection as to the whole amount of the claim, and having failed in establishing his case, will pay the whole costs of the appeal, with interest at 12 per cent.

The 6th April 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Suits for rent—Clause 4 Section 23 Act X of 1859 (applicable to what cases).

Case No. 464 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. C. S Belli, Judge of Rajshahye, dated the 24th December 1862, reversing a decision of Baboo Satcowree Deb, Moonsiff of Nattore, with powers of a Deputy Collector, dated the 12th July 1862.

Messrs. Robert Watson & Co. (Plaintiffs) *Appellants,*

versus

Govind Chunder Mozoomdar (Defendant) *Respondent.*

Mr. R. T. Allan and *Baboo Mohinee Mohun Roy* for Appellants.

Baboo Debender Narain Bose for Respondent.

The class of cases made cognizable by a Collector under Clause 4 Section 23 Act X of 1859 is described in terms wide enough to extend his jurisdiction in suits for rent to cases of tenancies not strictly agriculturable, provided the subject of the lease is land, and the rent issues out of the land and is due on account of and for the use of the land, whatever may be the purpose for which the surface of the land is used.

Morgan J.—THE suit is described in the judgment of the Lower Appellate Court as a suit brought (under Section 23 Act X of 1859) "against the appellant by the Messrs. Watson, to recover the farming rent of a golah or place where the dealers in produce bring their goods for sale, paying a tax either in kind or money to the golahdar or person to whom the right of taking the tax for the time being appertains. In the kuboolent taken by the Messrs. Watson from appellant, all the culturable land about the golah is reserved for themselves, the right to levy the tax being the only thing which is farmed out to appellant."

The decision of the Lower Appellate Court is that this is not a suit cognizable by the Collector.

We have read the kuboolent. The subject of the lease is the land itself to which the dealers resort, and not merely a "right to levy tax" there. The land is described, and the culturable portion of it is excepted, the remainder being let to the golahdar.

The provisions of the Act generally contemplate tenants who cultivate land, or gather its natural or artificial products; but the class of cases which by the 4th Clause of Section 23 is made cognizable by a Collector of Land Revenue, is described in terms wide enough to extend his jurisdiction in suits for rent to cases of tenancies which are not strictly agricultural tenancies. He has jurisdiction in "all suits for arrears of rent due on account of land, either kherajee or lakheraj, or on account of any rights of pasturage, forest rights, fisheries, or the like." For whatever purposes the surface of the land may be used, if the subject of the lease is land, and the rent issues out of the land as here, and is due on account of, and for the use of, the land, a suit for arrears must be brought in the Collector's Court.

In the case cited (decided 17th November 1862) no specific land was let. The subject of the lease was not land, although it was connected with land, and could be fully enjoyed only by means of the land. What

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was granted to the defendant there, was a right to collect certain duties and to make use of the plaintiff's land (which extended for many miles along the side of a river) for the purpose of erecting ghauts, &c., where (and for the use of which) the dues were to be collected. No specific land was granted, and the cause of suit there was not "rent due on account of land." We allow the special appeal, but without costs. The Collector's decree will be affirmed.

The 13th April 1864.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Jurisdiction of Collector—Powers of High Court (under Section 35 Act XXIII of 1861).

Case No. 465 of 1863.

Miscellaneous Appeal from an order passed by Mr. G. Bright, Judge of the 24-Pergunnahs, dated the 25th July 1863.

Rughoonath Mitter, *Appellant,*

versus

Woomanath Chowdry, *Respondent.*

Baboo Ashootosh Dhur for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

A ganteedar was, on the suit of the putneedar, ejected from his holding, notwithstanding his objection that he held a right of occupancy independently of his gantee, and the Collector in appeal confirmed the order. HELD that the Collector had full jurisdiction to pass such an order, and that, even if he had not, the proper mode to question his order would be by civil suit, and not under Section 35 Act XXIII of 1861, the Collector's Court not being a Court subordinate to the High Court.

Jackson, J.—THIS was a suit under Section 25 Act X of 1859. The defendant, who alleged that he was a ganteedar, was, on the suit of the putneedar, ejected from his own holding, notwithstanding his objection that he held a right of occupancy independent of his gantee. On appeal the Collector confirmed the order, and on appeal again to the Commissioner, those orders were upheld.

This case is now brought before this Court on a summary special appeal, and it is alleged that this Court should revise the proceedings of the Collector under Section 35 Act XXIII of 1861, on the ground that the Collector has exercised a jurisdiction not vested in him by law.

We are of opinion that the Collector had full jurisdiction to pass the order complained of; and even if he had not, the proper mode to question his order would be by civil suit. The Collector's Court was not, as respects this suit, a Court subordinate to the High Court, and Act XXIII of 1861 does not therefore apply.

This appeal is dismissed with costs and interest.

The 13th April 1864.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Abatement of suit.

Case No. 2282 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 21st April 1863, *reversing a decision passed by the Officiating Collector of Monghyr, dated the 25th September*. 1862.

Jugomohun Sing (Plaintiff) *Appellant,*

versus

Dabee Pershad and others (Defendants) *Respondents.*

Baboo Onookool Chunder Mookerjee for Appellant.

Baboos Chunder Madhub Ghose and *Lukhee Churn Bose* for Respondents.

The death of an appellant was held to be no reason for the abatement or postponement of a case which was being continued to be conducted by an agent for the appellant and was not in any way prejudiced.

Seton-Karr, J.—THE point argued in this case is that the regular appeal should have abated on the death of the defendant appellant, which fact was duly brought to the notice of the Lower Court.

We find, however, that the said fact was brought to the Judge's notice, merely to excuse the personal appearance of the defendant, and not for any other object; and that the case was still being conducted by an agent for the defendant, and was not in any way prejudiced.

In this view we hold, after reference to Sections 99 and following of the Civil Procedure Code, that there is no reason why the case should have abated or even have been postponed. The plaintiff, special appellant, has

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moreover nothing to complain of, for his case went regularly to trial, and he lost nothing by this measure. Had any person any ground of complaint in the matter, which we do not say, it would be the defendant, and not the plaintiff.

In this view we hold the objection to be purely technical, and we dismiss this appeal with costs.

The 14th April 1864.

Present:

The Hon'ble C. B. Trevor and A. G. Macpherson, *Judges.*

Under-Tenures—Sale in execution—Sections 105 and 106 Act X of 1859.

Case No. 1659 of 1863.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Hooghly, dated the 25th February 1863, *reversing a decision of Baboo Naruttun Mullick Moonsiff of Sulkea, dated the 21st August* 1862.

Doorga Persad Bose (Plaintiff) *Appellant,*

versus

Sreekisto Moonshee and others (Defendants) *Respondents.*

Baboo Nobo Kishen Mookerjee for Appellant.

Baboo Kedarnath Chatterjee for Respondents.

Under Section 105 Act X of 1859, an under-tenure is liable to sale in execution of a decree for arrears of rent for 11 years. Any party wishing to stay the sale on the ground of his being the proprietor of the under-tenure, must comply with the provisions of Section 106.

Macpherson, J.—THE appellant instituted a suit to recover possession of an under-tenure, of which the respondent Sreekisto Moonshee was in possession under a sale made to him improperly, as the appellant alleges, in execution of a decree in a suit brought under Act X of 1859.

The appellant and his brother Trilochurn Bose were in possession in equal shares of the under-tenure referred to, which stood in the sole name of Trilochurn. Trilochurn died, and was succeeded by his son Greeschunder, and the tenure thenceforth stood in the name of Greeschunder. A suit for 11 years' rent was instituted under Act X of 1859 against Greeschunder and the appellant. Greeschunder appeared and admitted the rent to be due, and a decree was, on the 20th November 1861, given against him alone. In satisfaction of this decree, the tenure was sold, and the respondent Sreekisto Moonshee became the purchaser, and was put in possession.

But on the 13th of November 1861, the appellant (being already in possession of his own share) obtained possession also of Greeschunder's share under a sale made in execution of a decree in a civil suit brought by the appellant against Greeschunder as representative of Trilochurn, at which sale the appellant purchased the right of Greeschunder in the property.

At the time of the sale in the Act X case, appellant was not registered in the zemindar's serishta as superior tenant.

Appellant now urges in appeal that it was wrong to sell the tenure in execution of a decree for arrears extending over 11 years, and that no lien attached to the land in respect of those arrears, except so far as the arrears of one year were concerned.

It appears to us that, under Section 105 of Act X of 1859, the under-tenure was liable to sale in execution of the decree for the arrears of 11 years. The suit was brought in accordance with the provisions of Section 32 of Act X, and the decree was rightly given against Greeschunder, in whose name the tenure stood, and who admitted the arrears to be due. It may be that, under the old law, only one year's rent formed a lien on the land, and that the present case is one of an exceptional character, and is such as is not likely to occur frequently in future. But, in our opinion, the terms of Section 105 of Act X are so wide as clearly to render the sale of this under-tenure lawful, even in execution of a decree for the arrears of 11 years. The Section declares generally and without any restriction or limitation that, if the decree be for an arrear of rent due, &c., the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree according to the rules for the sale of under-tenures for the recovery of the arrears of rent due in respect thereof, contained in any law for the time being in force. We do not see how it is possible to exclude the case before us from the operation of these words, and we therefore think that the sale was good.

Moreover, if the appellant wished to stay the sale on the ground of his being the proprietor of the tenure, he ought to have complied with the provisions of Section 106 of Act X, which he does not seem to have done.

The appeal is dismissed with costs.

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The 14th April 1864.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Jurisdiction—Sub-lease—Co-sharers.

Cases Nos. 266 and 226 of 1863.

Regular Appeals from a decision passed by the Principal Sudder Ameen of 24-Pergunnahs, dated the 29th December 1862.

Radhajeebun Mustafee and others (Plaintiffs) *Appellants,*

versus

Denonath Banerjee and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Mohesh Chunder Chowdhry* for Appellants.

Baboos Chunder Madhub Ghose, Hem Chunder Banerjee, Kally Mohun Doss. and *Mohesh Chunder Mitter* for Respondents.

Suit against co-sharers and dur-ijaradar for rent and damages in respect of a mehal of which a sub-lease was granted by the defendant co-sharers. As plaintiff did not get possession of his share until after the expiry of the sub-lease, and then only by the aid of the Civil Court; and as his title during the subsistence of the lease was merely nominal, and as he exercised no rights of a landlord during this period, and could not have sustained against the dur-ijaradar an action for rent under Act X of 1859,—HELD that his suit was properly brought in the Civil Court. HELD also that, as the dur-ijaradar was in no way the plaintiff's tenant, and had not joined in the plaintiff being obstructed from getting possession of his share, the co-sharers alone were liable, and not the dur-ijaradar also.

Glover, J.—THESE are cross-appeals from the same decision.

Appellant in No. 266, Radhajeebun Mustafee, a one-third co-sharer in the sudder ijara of Khas Mehal Turuf Mathoor, standing in the name of Lukee Doss, sues to recover his share of the rents of the mehal for the years 1258-59 B. S., and for damages from the years 1260 to 1264 B. S., during which time he was kept out of possession. It appears from the record that some previous disputes between the parties had been settled by a decree of Court followed by a ruffanamah, by the terms of which the appellant's co-sharers, Lukee Doss and Surbessur Mustafee, bound themselves (in case the rent of the mehal was not paid for the years 1258-59 B. S.) to join him in a suit for its recovery from the dur-ijaradar Denonath Banerjee (appellant in No. 226), and agreed in case of their not so joining him, and if the rent in question still remained unpaid, to pay him themselves Rs. 1500, at the rate of Rs. 750 for each year. The ruffanamah further stated that the appellant was to receive khas possession of his one-third share of the ijara in 1260 B. S., from which date the responsibility of his co-sharers was to cease.

Appellant, not having received either the rent or possession stipulated, sues to recover both, with proportionate damages, from his co-sharers and the dur-ijaradar conjointly.

The Mustafee defendants (respondents) deny all liability for the rents of 1258-59 B. S., and plead the terms of the ruffanamah which barred the appellants from suing them in respect of anything that happened after the year 1260 B. S.

The dur-ijaradar contends that he was not in possession of the under-farm during the years 1258-59, and, consequently, cannot be liable for rent; and that he has never given a kubooleut to the appellant Radhajeebun, or considered him as his landlord. He adds that he paid all rent due up to the termination of his ijara lease in 1264 to the recorded co-sharer Lukee Doss Mustafee.

The Principal Sudder Ameen held that the appellant's claim for damages during the years 1260-64 was in reality one for rent, and as such only cognizable by the Revenue authorities under Act X of 1859. For the rent of the years 1258-59, he made the dur-ijaradar Denonath primarily responsible, and in the event of the money not being recoverable from him, extended the liability to the two Mustafee defendants.

Against this decision, both Radhajeebun and the dur-ijaradar appeal.

The points for consideration are :—

1. Is the claim for the years 1260-64 B. S. properly cognizable by the Civil or the Revenue Courts?

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2. If by the former, who is liable for the appellant Radhajeebun's losses ?

3. Who is liable for the rents of the years 1258-59, and what do they amount to ?

We have heard this case argued at great length, and are clearly of opinion that there is no sufficient evidence to connect the appellant and Denonath together in the relation of landlord and tenant. The former had certainly rights in the mehal ; but it is abundantly clear that, during the whole period for which compensation is demanded, he never exercised them, nor assumed any of the privileges of a landlord, he was never in possession of any part of the estate for a single day.

The sub-lease was granted to Denonath by Lukee Doss, the ostensible ijaradar, and it was to him that Denonath was liable for rent. Indeed, Denonath himself in his defence to this suit denies that he had any agreement with the appellant, or had in any way attorned to him as landlord. Had appellant got possession of his one-third share in 1260 B. S., according to the terms of the ruffanamah, it would have been of course a different thing ; but it is clear from the record that he never did get possession till the year 1265 B. S., after the dur-ijara lease had expired, and then only by the aid of the Civil Court. In no way, therefore, can it be contended that Denonath was Radhajeebun's tenant: the former, no doubt, was in use and occupation of land, a share of which was of right the appellant's property ; but, until the year 1265 B. S., Radhajeebun's title was merely nominal, and he exercised none of the rights of a landlord, nor could he have sustained against Denonath an action for rent under Act X of 1859.

We think, therefore, that the Principal Sudder Ameen was wrong, and that the suit was properly brought in the Civil Court.

The question remains, From whom is appellant entitled to claim ?

Not we think from the dur-ijaradar, as we have already decided that Denonath cannot be considered in the light of appellant's tenant. He was responsible to the ostensible co-sharers, Lukee Doss and Surbessur, to whom he asserts that he paid all that was due on the farming lease. Had it been shown that Denonath had taken any part in the obstruction, we might, perhaps, have held him liable together with the farmers as a wrong-doer ; but nothing of this kind is proved, and it appears to us that the co-sharers are the only legally responsible parties.

They object, indeed, that by the terms of the ruffanamah, they are not liable ; but they cannot be allowed to avail themselves of its privileges when they have all along refused to carry out its provisoes, and, instead of giving appellant possession of his share in 1260 B. S., forced him to apply to the Civil Court for his rights. It is very easy for them to assert, as they do here, that they caused Denonath to petition the Judge in respect of Radhajeebun's third, and to urge that, in all their demands for rent against the dur-ijaradar, they invariably excluded their partner's share ; but such disclaimers can go for nothing against the fact that, in the year 1258, Lukee Doss Mustafee, the managing partner, gave a lease to Denonath of the entire ijara for a period of 7 years ; gave, in short, what he had no power to grant, and put a third party into possession of the entire farm. In the face of this, he now declares that he never obstructed the appellant Radhajeebun, nor in any way prevented his getting possession of his share in 1260.

We are decidedly of opinion that it was through the misfeasance of his co-sharers that appellant was kept out of his property, and it seems to us but just and proper to saddle them with the loss sustained.

We also consider them equally and solely liable for the rents of the years 1258-59 B. S. The terms of the ruffanamah stipulated that, if they did not join appellant in suing Denonath for these rents, they themselves should be responsible for them, and they cannot now avoid that responsibility. With respect to the amount, the appellant Radhajeebun's claim to rupees 1,628-8 cannot be upheld. That sum, no doubt, represents two years' rent of his share of the ijara ; but, in the present case, appellant is bound equally with the respondents by the terms of the ruffanamah, and cannot recover more than he then stipulated for, *viz.* rupees 1,500.

The appeals are, therefore, decreed, and the Lower Court's orders reversed. Radhajeebun will recover rupees 1,500, the amount due for the years 1258-59 B. S. He will also recover as damages rupees 4,071-4, the aggregate value of his share during the years 1260-64 B. S., both sums with interest.

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The Mustafee defendants (respondents) will likewise pay all the costs of suit, excepting those of Denonath. Under the circumstances of the case, we think that this appellant, although released from liability, should pay his own costs.

The 19th April 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Attendance of plaintiff—Section 35 Act X of 1859.

Case No. 547 of 1863 under Act X of 1859.

Regular Appeal from a decision passed by the Officiating Collector of Purneah, dated the 25th August 1863.

Baboo Lekhraj Roy (Plaintiff) *Appellant,*

versus

Mr. W. H. Buckland, Agent for Messrs. Ashburner & Co., (Defendant) *Respondent.*

Baboos Hurro Kally Ghose, Sham Loll Mitter, and *Chunder Kally Ghose* for Appellant.

Mr. R. T. Allan for Respondent.

Suit laid at rupees 10,557-15-3.

Where the agent of a plaintiff is unable to give sufficient evidence, the Court should, under Section 64 Act X of 1859, require the attendance of the principal, and not dismiss the suit by a reference to Section 35 which refers to an earlier stage, and has nothing to do with a case after it has once proceeded to a hearing.

Morgan, J.—SECTION 35 of Act X of 1859, which the Deputy Collector refers to, has no application to this case. That Section refers to an earlier stage of the suit in which the statement of claim is presented. The suit had proceeded to a hearing. If the Deputy Collector found at the hearing that the agent of the plaintiff was unable to give such evidence as he thought sufficient, he might, under Section 64, have required the attendance of the principal. But he seems to have disposed of the case without any further proceeding than reading the evidence of the agent, and then disposing of the case by a reference to the 35th Section. We must remand the case to him for a full trial.

The 19th April 1864.

Present:

The Hon'ble F. B. Kemp and A. T. T. Peterson, *Judges.*

Possession (by purchaser of a house sold under Section 110 Act X of 1859)—Appeal (to Judge).

Case No. 438 of 1863.

Miscellaneous Appeal from an order of Mr. F. Tucker, Judge of Shahabad, dated the 6th August 1863.

R. Solano (Decree-holder) *Appellant,*

versus

Bulbhudhur Singh (Judgment-debtor) *Respondent.*

Mr. R. T. Allan for Appellant.

Moulvie Syud Murhumut Hossein for Respondent.

The purchaser of a house sold under Section 110 Act X of 1859 is not bound to bring a regular suit to obtain possession.

Where the Collector referred a purchaser to a regular suit, and the value of the property exceeded 100 rupees, the appeal was held to lie to the Judge.

Peterson, J.—THIS is an application to remand a case to the Judge of Zillah Shahabad under Act X of 1859. The facts of the case are as follow :—

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Mr. Solano was the purchaser of a house sold under the provisions of Section 110 of that Act, and applied to the Collector to be put in possession of the house purchased by him. The Collector referred him to a regular suit to obtain possession. From this judgment of the Collector, Mr. Solano appealed to the Judge, who rejected the appeal, on the ground that he could not take cognizance of it on the ground of want of jurisdiction, without expressing any opinion as to the merits of the case.

We are of opinion that the Judge was wrong, and that he ought to have heard the appeal. The Collector, in suits for rent, sits as a judicial officer, and provided the amount sued for, or the value of the property claimed, exceeds 100 rupees, his judgment is open to appeal under Sections 160 and 161.

The vakeel for the respondent contended that the Collector had proceeded under some order of the Commissioner of the District. The Court, however, is of opinion that this was a case in the adjudication of which the orders of the Commissioner would not be binding.

The vakeel for the respondent suggested that there was no law by which a Collector could put a party into possession of property purchased at a sale under Section 110. Now, Section 110 says that, if the property against which execution was applied for be a house or other building, process shall be issued in the same manner as for the attachment and sale of moveable property under Sections 98 and 99 of the Act; putting a house or other building exactly on the same footing as moveable property. Such being the case, we do not think a party ought to be put to a regular suit to obtain possession. The Act itself provides for claimants intervening in cases of property sold under those Sections. In the present case, there appear to have been no objections taken; and if there had been, the Collector was bound to notice them according to the provisions of the Act. We are of opinion that the Judge had jurisdiction, and we remand the case to him.

The 19th April 1864.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Jurisdiction (how to be determined).

Case No. 1776 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Rungpore, dated the 14th February 1863, reversing a decision passed by the Sudder Ameen of that District, dated the 18th July 1862.

Nobin Chunder Roy Chowdry (Plaintiff) *Appellant,*

versus

Bhowanee Pershad Doss and others (Defendants) *Respondents.*

Baboo Oprokash Chunder Mookerjee for Appellant.

Moulvie Murhumut Hossein for Respondents.

In determining whether a suit will lie in the Civil Court or not, the plaintiff's allegation, and not the defendant's plea, must be looked to. Where a plaintiff alleged that the defendant was a trespasser, and, on the ground of that trespass, sued for possession, the suit as brought was held to lie in the Civil Court.

Trevor, J.—This is a suit for possession of a bheel, on the ground that the defendant is a trespasser and has ousted him, plaintiff, by means of a summary order of Court.

The defendant denies that he is a trespasser, but alleges that he has been in possession of the bheel as a tenant of the plaintiff for many years past.

The Principal Sudder Ameen thinks it quite clear that the plaintiff was not dispossessed as alleged by him. He thinks it also clear that defendants have been in possession of the bheel for a long time past as a tenant of the plaintiff. The suit, therefore, the Principal Sudder Ameen remarks, is cognizable only under Act X of 1859, and should be dismissed with costs.

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The plaintiff now appeals specially, urging, 1st, that the Principal Sudder Ameen is wrong in ruling that the present suit is cognizable only under Act X of 1859 ; and, 2nd, that he has found plaintiff to be in possession of the bheel relying on what is no legal evidence, and, consequently, on no evidence at all.

In determining whether a suit will lie in the Civil Court or not, we must look to the plaintiff's allegation, not to the defendant's plea. The plaintiff alleges that defendant is a trespasser, and, on the ground of that trespass, sues for possession. We think there is no doubt that the suit as brought will lie in the Civil Court ; and we are, therefore, of opinion that the Principal Sudder Ameen is incorrect in determining that this suit can only be heard under Act X of 1859. As to the allegation that the Principal Sudder Ameen has decided the case in defendant's favor on no evidence at all, that we find is not borne out by fact ; one of the decisions relied on by him having been passed in the presence of the surburakar of the Court of Wards representing the plaintiff when a minor. Though, then, we think the Principal Sudder Ameen wrong as to the applicability of Act X of 1859, yet we consider his present decision simply as a dismissal of plaintiff's claim suing the defendant as a trespasser, and we dismiss the special appeal with costs.

The 23rd April 1864.

Present :

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Jurisdiction — Suit for excess rents collected under a lease.

Case No. 815 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. J. C. Dodgson, Judge of Mymensing, dated the 7th January 1863, *reversing a decision of the Deputy Collector of that District, dated the 30th October* 1862.

Syed Shorafut Ali (Plaintiff) *Appellant,*

versus

Sheik Ramzan and Sheik Nubee Bux (Defendants) *Respondents.*

Mr. A. F. Lingham and *Baboo Debendro Narain Bose* for Appellant.

Baboo Kalee Mohun Doss for Respondents.

A suit for excess rents collected under a lease under which the lessee was, in consideration of a certain sum of money, to pay the Government revenue and re-imburse himself from the remainder of the assets, and which provided for an annual measurement and assessment, was held cognizable in the Civil, and not the Revenue Court.

Jackson, J.—THE special appellant leased to defendant certain lands for the consideration of a certain sum of money, the defendant to pay in the Government revenue, and to reimburse himself from the remainder of the assets. It was added in the lease that there should be an annual measurement by the Ameens of both parties, and appellant and defendant would be responsible according as the assessment was found to have decreased or increased. The special appellant sued, after some years, to recover the excess rents which he alleged the defendant had collected. The first Court gave a decree, but the Appellate Court dismissed the action, because the measurement had been carried out by the Ameen of appellant alone, and not by the Ameens of both parties.

On special appeal it is said that this order is wrong. The respondent, defendant, however, says that this excess could not be recovered as arrears of rent. We think that the respondent's objection is valid, and that this suit should be preferred in the Civil Courts, and not under Act X of 1859.

Although, therefore, we do not agree with the Judge in his finding, we confirm his decision on other grounds.

Each party will pay his own costs of this litigation.

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The 23rd April 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Ejectment (of farmer) — Clause 6 Section 23 Act X of 1859.

Case No. 1973 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. W. H. Brodhurst, Judge of Sarun, dated the 13th April 1863, reversing a decision of Mr. J. Macleod, Deputy Collector of that District, dated the 30th August 1862.

Lungut Mahtoon (Plaintiff) *Appellant,*

versus

Rameshur Roy (Defendant) *Respondent.*

Mr. John Baptist for Appellant.

Mr. A. F. Lingham for Respondent.

The disturbing or dispossessing the cultivators is tantamount to ejecting and disturbing in the receipt of rent the farmer to whom they pay rent, for which a suit will lie under Clause 6 Section 23 Act X of 1859.

Morgan, J.—We think this case must be remanded. The Clause of Act X of 1859 under which the suit has been brought (that is to say, the 6th Clause of Section 23) gives jurisdiction to the Collector in a suit to recover the occupancy or possession of any farm from which the farmer has been illegally ejected by the person entitled to receive rent, for the same. The plaintiff in this suit appears to be a farmer entitled to receive rent, either in money or in kind from certain cultivators. Witnesses state that the defendant in the suit dispossessed him. If the defendant in the suit has disturbed or dispossessed the cultivators, he has in effect ejected and disturbed in the receipt of rent the farmer to whom they had been paying their rent. The Judge observes in the judgment that the "plaintiff in his deposition does not say that he was ejected, neither do his witnesses." But upon reference to the evidence, we find this to be a misapprehension. The date of the ejectment or dispossession and the fact are stated.

The Judge also says:—"It seems doubtful whether the plaintiff was ever in possession, for two other persons are mentioned as being the real cultivators." But if the plaintiff is a farmer who complains that he has been ejected from his farm, the fact of two other persons being the actual cultivators, is not inconsistent with his claim.

The Judge also remarks:—"Besides, if ejected, as stated in the plaint, the claim was brought after unnecessary delay, which is not accounted for." The delay is apparently little more than three months, the suit having been brought within the fourth month.

As we see reason to think that the Judge decided the case upon a misapprehension of the plaintiff's claim, as though it was a claim by a ryot in respect of dispossession of land, we will remand the case to him for trial.

The 25th April 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Possession — Dispossession (under Section 318 Code of Criminal Procedure).

Case No. 2376 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. A. Swinton, Judge of Tipperah, dated the 11th June 1863, affirming a decision of Moulvie Gholam Hossein, Deputy Collector of that District, dated the 31st March 1863.

Sreemutty Lukhee Debea Chowdhrain (Plaintiff) *Appellant,*

versus

Gooroo Doss Sein and others (Defendants) *Respondents.*

Baboos Sreenath Doss and *Hem Chunder Banerjee* for Appellant.

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Baboos Chunder Madhub Ghose and *Dwarkanath Mitter* for Respondents.

A tenant dispossessed by order of a Magistrate under Section 318 of the Code of Criminal Procedure, is not bound to sue for the reversal of that order in order to recover possession.

Levinge, J.—THE judgment of the Lower Appellate Court has decided that the plaintiff's claim is barred by the Law of Limitation. There are inconsistencies in that judgment which we do not attempt to reconcile; but we are clear that the suit is not barred by any Law of Limitation, whether it was instituted and framed with a view to set aside the Magistrate's order, or to obtain possession under Act X of 1859, inasmuch as the date of dispossession was 27th April 1862; the Magistrate's order, the 25th July 1862; and the date of institution of suit, the 6th day of January 1863, and therefore within a year of the date of dispossession, and consequently less than a year from date of the Magistrate's order under Act XXV of 1861, Section 318. The plaintiff, in our opinion, having regard to the language of that Section, was not bound to notice that order or sue for its reversal, as it was only made to secure the peace, and the Act does not say it must be reversed by a Court. It simply declares the possession to be kept until the complainant establishes his title by due course of law. As the plaintiff insists that he is the defendant's ryot, and that the defendant (who, he says, is his landlord) has illegally dispossessed him, the Collector has jurisdiction to try the suit, and the plaintiff is not barred by lapse of time. If the above relationship does not exist, then the suit must be dismissed with costs. We allow the special appeal, and remand the case for trial.

The 25th April 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Trial of Issues — Forged pottah.

Case No. 2393 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. W. H Brodhurst, Judge of Sarun, dated the 27th May 1863, reversing a decision of Baboo Gobind Chunder Sandel, Moonsiff and Deputy Collector of that District, dated the 9th February 1863.

Kemal Kishen and others (Defendants) *Appellants,*

versus

Achaiher Roy and others (Plaintiffs) *Respondents.*

Baboo Kalee Kissen Sein for Appellants.

Baboo Tarucknath Sein for Respondents.

Where the first Court found the pottah on which the plaintiff relies to be a forgery and dismissed the suit,—HELD that the Lower Appellate Court could not decree the case without trying the issue as to the genuineness of the pottah.

Levinge, J.—THE plaintiff sued to recover possession relying on a pottah, and the issue taken was whether the plaintiff had been in possession of the lands under the pottah. The first Court found that the pottah was a forgery, and dismissed the suit. From this decision there was an appeal, but no decree has been passed by the Judge on this point, but he has found for the plaintiff on other grounds.

This is a defect in the adjudication, and we must remand the suit to the Lower Appellate Court to decide whether the plaintiff has sued on a forged pottah, and try the issue decided by the first Court and raised on the pleadings. If the plaintiff *has put forward a forged pottah and raised an issue upon it,* he must take the consequences, and the Lower Appellate Court should give effect to the finding of the first Court, and not only refuse to give the plaintiff any relief, but should dismiss the appeal with costs, and exercise its discretion as to taking criminal proceedings against the plaintiff.

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The 27th April 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble W. S. Seton-Karr, *Judge*.

Notice of Enhancement (service of) —Indigo Factory.

Case No. 433 of 1863 under Act X of 1859.

Regular Appeal from a decision passed by Baboo Shib Persad Sandial, Deputy Collector of Jessore, dated the 30th June 1863.

Huronath Roy and others (Plaintiffs) *Appellants,*

versus

Mrinomoyee Dabee (Defendant) *Respondent.*

Baboos Sreenath Doss and *Obhoy Churn Bose* for Appellants.

Mr. R. T. Allan and *Baboo Dwárkanath Mitter* for Respondent.

Suit laid at rupees 9,978-5-2.

A notice of enhancement, served under the provisions of Section 18 Act X of 1859, is not informal, because it does not bear the signature of the landlord or his agents.

An indigo factory is a "conspicuous place," within the meaning of the same Section, where a notice of enhancement may be affixed.

Seton-Karr, J.—THE plaintiff sued to enhance the rent of some 6,504 beegahs and 7 cottahs of land held by the defendant at a variable jumma of Rs. 1,121-1-1. The plaintiff asserted that the rent leviable according to the pergunnah rates was Rs. 9,163-5-7.

The defendant pleaded that the lands constituted a mofussil talook held at a fixed rental.

The whole case at present turns on the service of notice.

The defendant, appellant, is resident of Santipore in Nuddea, the land sued on being situated in Jessore, and the notice, it seems, was served on the defendant at the factory of Ramnuggur, which, it is not denied, is built on a portion of these lands.

The Deputy Collector has held that the notice, which was served under the provisions of Section 13 Act X of 1859 was informal, because it did not bear the signatures of the plaintiff or his agents. He also held that the grounds on which the enhancement was demanded were other than those provided for in Section 17; and lastly, that the notice, instead of having been served at the mal kutcherry of the place where the disputed land is situated, was served at the factory of Ramnuggur. For these reasons, the Deputy Collector threw out the suit.

We are quite clear that the decision is erroneous, and that it must be reversed. The notice was obviously issued on the part of the plaintiff, and the Act nowhere says that the same must bear his signature. The notice was duly served through the agency of the Revenue authorities, and no objection was taken by the Deputy Collector to the document. The case quoted from the decisions of the late Sudder Court does not apply, for in that case, the notice was issued by persons other than the plaintiff.

Then, as to the grounds of enhancement, the notice duly alludes to Section 17 of the Act, and mentions the grounds of enhancement to be the pergunnah rates and the value of the produce. These are some of the grounds distinctly contemplated in the Section in question, and the Deputy Collector, it is quite clear, is wholly wrong on this head.

As regards the place where the notice should be issued, the law prescribes that, if the defendant, as in the case before us, shall have no place of residence in the district in which the land is situated, the notice shall be served by affixing it at the *mal* kutcherry or other "conspicuous place" thereon, &c. Now, in this instance, it appears from the return that notice was served at the kutcherry and factory of Ramnuggur.

It can never be contended that an indigo factory is not a conspicuous place on the land, such as the Act contemplates, nor is there any force in the argument of Mr. Allan for the respondent to the effect that a single service at Ramnuggur was insufficient, and that the notice should have been repeated at other places forming part of the lands which are scattered over many mouzahs.

In our opinion the substantial requirements of the law have been fully met, and the notice is regular and has been properly served. The objections taken by the Lower Court have no good foundation. The case must have a full trial on the merits, for which purpose we remand it.

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The 3rd May 1864.

Present:

The Hon'ble F. B. Kemp and E. P. Levinge, *Judges.*

Jurisdiction — Section 58 Act X of 1859—Revival—Ex-parte decree — Auction-purchaser—Rent.

Case No. 580 of 1863 under Act X of 1859.

Regular Appeal from a decision passed by Mr. D. Cunliffe, Collector of Rajshahye, dated the 13th October 1863.

Jotendro Mohun Tagore (Plaintiff) *Appellant,*

versus

Kinkuree Debee (Defendant) *Respondent.*

Baboos Baneemadhub Banerjee and *Sreenath Doss* for Appellant.

No one for Respondent.

A Collector does not act without jurisdiction in reviving, under Section 58 Act X of 1859, an *ex-parte* decree passed by a Deputy Collector, upon an application made within 15 days from the sale in execution of that decree.

An auction-purchaser is not bound to wait for his rent until he can clear away all fraudulent incumbrances created by his predecessor.

Kemp, J.—THIS is a suit for the recovery of arrears of rent amounting, with interest, to Rs. 12,063-14-11. The plaintiff purchased a 2 anna 15 gunda share of Pergunnah Lushkurpore, at a sale held by the Master of the late Supreme Court on the 13th Agran 1265 B. S. The defendant is a putneedar within the aforesaid zemindaree, and holds under a kubooleut granted to her by the widow of the former proprietor of the pergunnah. The plaintiff in his plaint intimates an intention to sue to set aside the putnee tenure of the defendant as a fraudulent creation of the widow of the late proprietor. In the meantime he is content to recover the rent which the defendant admits to be due under the kubooleut. The suit was first tried by the Principal Sudder Ameen with powers of a Deputy Collector, and on the 28th September 1863, the plaintiff obtained an *ex-parte* decree. The defendant then applied for a revival of the suit, under the provisions of Section 58 Act X of 1859, and his application was granted by the Collector. On re-trial the plaintiff's suit was dismissed.

The Collector held that, as the plaintiff had intimated that the putnee of the defendant was a fraudulent and benamee tenure, his suit to recover upon a kubooleut admittedly fraudulent was "an act for which the plaintiff should be held responsible under the law for fraudulent transactions." We quote the Collector's own words.

In appeal we have to consider two points: 1*st*, whether the Collector acted without jurisdiction in reviving the suit under the provisions of Section 58; 2*nd*, whether the plaintiff is not entitled to a decree on the kubooleut admitted by the defendant.

On the *first* point we are of opinion that the Collector has not acted without jurisdiction. The suit was originally instituted in his Court, and was transferred by him to the Principal Sudder Ameen for trial. After the *ex-parte* decree, an application to revive the suit was made to the Collector and was entertained by him. The Collector having a general control over all Revenue Officers in his district, was competent to take the case up and to pass orders on it. We have not been shown that there is any irregularity in the Collector's proceedings, and in the absence of any proof to the contrary, we must act upon the maxim of "*Omnia præsumuntur rite esse acta.*"

It has been urged upon our attention by the pleaders for the appellant, that more than 15 days had elapsed from date of process for enforcing the *ex-parte* judgment to date of the application for a revival of the suit, and that, therefore, the Collector acted without jurisdiction. (*See* Section 58 Act X of 1859.) We are of opinion that this objection is without weight. We find that no process for enforcing the *ex-parte* judgment had been *executed* at any time exceeding a period of 15 days prior to the date of the application for the revival of the suit.

The object of Section 58 is to prevent parties from surreptitiously obtaining *ex-parte* decrees, and to give a defendant, who frequently has no knowledge of the suit till long after the decree has passed, an opportunity of setting aside such a decree within 15 days after the actual execution of any process, such as attachment or arrest of person. In the present case the plaintiff simply petitioned that the putnee in default might be sold. Proclamations of sale were issued, and the sale eventually took place on the 28th July 1863. The application for the revival of the suit was made on the 6th August 1863, or within 15 days from the sale, which was the first effectual process in execution of the *ex-parte* decree. For these reasons we hold that the Collector had jurisdiction, and having acted with jurisdiction, no appeal will lie from his order reviving the suit.

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On the *second* point, which covers the merits of the case, we are clearly of opinion that the Collector is wrong. The plaintiff, as auction-purchaser, is not bound to wait for his rent until he can clear away all fraudulent incumbrances created by his predecessor. The Government claim for revenue cannot be put off for a day even, and a landlord is clearly entitled to recover what a tenant admits to be due, without losing his title to question the *bonâ fides* of the tenant's holding. In this case the defendant admits the kubooleut, but pleads tender of the rent, and also that some of the properties mentioned in the kubooleut are not in his possession. There is no proof of the tender; and if the defendant is out of possession of any portion of the land covered by the kubooleut, he ought to have taken steps to recover possession or have sued for abatement of his jumma. The plaintiff is, therefore, clearly entitled to a decree. We reverse the decision of the Collector, and decree this appeal with costs and interest payable by the respondent.

The 4th May 1864.

Present:

The Hon'ble F. B. Kemp and A. T. T. Peterson, *Judges.*

Enhancement (before Act X of 1859) —Mokururee holding.

Case No. 2084 of 1863.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Additional Judge of the 24 *Pergunnahs, dated the* 15*th May* 1863, *affirming a decision of Baboo Mohendro Nath Bose, Additional Moonsiff of Alipore, dated the* 23*rd August* 1862.

Romesh Chunder Dutt (Plaintiff) *Appellant,*

versus

Denobundoo Dey (Defendant) *Respondent.*

Baboo Sreenath Doss for Appellant.

Baboos Hem Chunder Banerjee and *Kally Prosunno Dutt* for Respondent.

Before Act X of 1859 there was no law which prevented a zemindar from enhancing his rent, unless it were shown that the ryot held at fixed rates for 12 years before the Decennial Settlement. A holding for 7 years would not be sufficient, nor can the ryot rely on a pottah granted by the Collector as giving him a mokururee tenure when the Collector had no power to grant such pottah.

Peterson, J.—In this case the appellant (plaintiff below) as purchaser of a zemindaree right under a sale by the Sheriff of Calcutta, brings a suit for the enhancement of the rent paid by the defendant, a ryot. The defendant in answer sets up a right to hold the land in question as representative of a party holding under a mokururee pottah granted by the Collector of the 24 Pergunnahs previous to the zemindaree in question being given in settlement under the Decennial Settlement afterwards made perpetual. The Court of first instance found that, as plaintiff had made no measurement, there was no ground for increasing the rent by reason of the defendant holding more land than for what he was paying rent; and as to the enhancement of the rent for the land actually held, that the defendant holding under a mokururee pottah from the Collector dated the 24th Cheyt 1194, his rent could not be enhanced.

The Judge, on appeal, confirmed the decision of the Court of first instance, with this addition, that it was not necessary for the defendant to rely on the pottah of the Collector, and even assuming that the Collector had no right to grant the pottah in question, still that the Government having in 1190 measured the land and settled with the defendant, the tenure was in existence before the Decennial Settlement, and that the rent could not be enhanced. From this decision the plaintiff has specially appealed.

On the part of the appellant it was contended that, as the case must be tried under the law previous to Act X of 1859 coming into effect, there was nothing that could operate as against the zemindar's right to enhance.

In the judgment of the Court this appeal must be allowed, and the case sent back to the Lower Court to enquire and find what was the proper rent for the quantity of land held by the defendant. There was no law at the time this suit was commenced which prevented the zemindar from enhancing his rent, unless it were shown that the ryot held at fixed rates for 12 years antecedent to the Decennial Settlement. The Sudder Court drew the presumption that, where a ryot held at a fixed rent for 12 years, he held under some binding agreement, and was in fact a mokururreedar. In the present case it was shown that the persons through whom he claimed had held this land 7 years before the Decennial Settlement. This is not sufficient; nor can the defendant rely on the pottah granted by the Collector of the 24 Pergunnahs on 24th Cheyt 1194 B. S., as giving him a mokururee tenure, as the Collector had no power to grant the pottah in question.

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The 4th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Jurisdiction—Standard of Measurement—Section 9 Act VI of 1862 B. C.

Case No. 3222 of 1863 under Act X of 1859.

Special Appeal from a decision of the Additional Judge of Nuddea, dated the 17th August 1863, *passed on appeal from a decision of the Collector of that District, dated the 5th June* 1863.

Mr. J. R. Mackintosh (Plaintiff) *Appellant,*

versus

Koylas Chunder Chatterjee (Defendant) *Respondent.*

Baboo Anund Chunder Ghosal for Appellant.

Baboo Onookool Chunder Mookerjee for Respondent.

A Judge on appeal has power, under Section 9 Act VI of 1862 B. C., to declare by what standard measurements are to be made.

Steer, J.—THE plaintiff applied to the Deputy Collector alleging that the defendant opposed the measurement he desired to make. The application was made under Section 9 Act VI of 1862 of the Acts of the Lieutenant-Governor of Bengal in Council.

The defendant appeared before the Deputy Collector, denied that he offered any opposition to the measurement or that he refused to appear, and complained that the plaintiff wanted to measure the land by an incorrect standard.

The Deputy Collector decided that the standard of the plaintiff was correct, and allowed the measurement after that standard.

The defendant appealed to the Collector, who thought that the Deputy Collector had gone beyond his proper province in enquiring what the proper standard of measurement was.

The plaintiff then appealed to the Judge, who ruled that the Collector had no jurisdiction to hear an appeal against the order of his Deputy; and at the request of both parties, he proceeded to enquire and decide what the proper standard of measurement was. On this point he holds that the defendant's standard was correct, and he required the plaintiff to measure the land in accordance with it.

From this decision the plaintiff appeals, *first*, that, on the appeal of the plaintiff made on the ground that the Collector had decided the appeal which was preferred to him without jurisdiction, the Judge had no right to enquire into or to declare what the standard of measurement ought to be. All he could do was to declare the Collector's order set aside, and to maintain the order of the Deputy Collector.

We do not hold that the Judge to whom this matter went on appeal, was not competent to decide the question of standard; but, certainly when both parties expressly asked him for a decision on the point, it cannot be made a ground of special appeal that the Judge acted without jurisdiction.

It is urged, *secondly*, that the Judge had no power under the Section above quoted to declare by what standard the measurement was to be made.

We think that, where the law lays down that measurements are to be made by the standard pole of the pergunnah, and a question arises what is the standard, the Judge is competent to decide it.

The *third* objection raised is that the decision of the Judge as to the standard is without legal evidence.

The evidence by which the Judge has disposed of the question of standard is this. He finds from official registers that a uniform recognized standard of measurement prevails in a certain quarter of his district. The lands to be measured are in that quarter. He finds the standard of measurement given in the public records accords with his knowledge of the standard as now prevailing, which knowledge he acquired in the ordinary discharge of his official duties.

We think this was quite an allowable way of arriving at the end aimed at,—*viz.* by what standard the lands ought to be measured; and if the plaintiff is not satisfied with it, he may leave the measurement alone.

Deeming all the objections which the special appellant has urged to be unsound, we dismiss the special appeal with costs.

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The 5th May 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Jurisdiction—Ejectment.

Case No. 2093 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 21st April 1863, reversing a decision passed by the Moonsiff of Ampta, dated 11th September 1862.

Radhanath Muzoomdar and others (Plaintiffs) *Appellants,*

versus

Purikhit Bodrik and others (Defendants) *Respondents.*

Baboo Khetternath Bose for Appellants.

Baboos Chunder Kalee Ghose and *Sham Lall Mitter* for Respondents.

A suit for dispossession between two ryots, with which the zemindar has nothing to do except as witness on one side, is cognizable, not by the Collector under Section 23 Act X of 1859, but by the Civil Court.

Jackson, J.—THE plaintiffs in this suit sought to recover from defendants possession of certain land which plaintiffs alleged belonged to them under a certain pottah. The defendants set up another pottah for the land, and the present landlord having been wrongly made a defendant by the Court, though he was no party to the suit, supported the pottah of the defendants.

The first Court dismissed the suit on the merits.

The second Court, on appeal, decided that, as the landlord supported the defendant's pottah, it must be considered that the landlord had dispossessed the plaintiffs, and that the suit must, therefore, be brought under Act X of 1859 Section 23 before the Collector, and not in the Civil Court.

Special appellant objects to this decision, and we think with very good reason. The plaintiffs had not sued the landlord, but had sued the defendants to recover from them possession of lands of which the defendants had dispossessed them. The zemindar had nothing to do with the suit, except as a witness on the side of the defendants. The question is between the title of the plaintiffs and that of the defendants. The Appellate Court, instead of trying it on its merits, strikes off the case for want of jurisdiction, a point not pleaded by either party, but adopted of its own accord by the Court.

We think the Court was quite wrong, and, reversing its decision, remand the case for trial on its merits.

The 5th May 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Suit for kubooleut at enhanced rates —Notice.

Case No. 2089 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Sarun, dated the 23rd May 1863, affirming a decision of the Deputy Collector of that District, dated the 21st February 1863.

Sheikh Woolfut Hossein and others (Plaintiffs) *Appellants,*

versus

Jumoona Doss and others (Defendants) *Respondents.*

Mr. A. F. Lingham and *Baboo Lukhee Churn Bose* for Appellants.

Baboo Kalee Kishen Sein for Respondents.

In a suit for a kubooleut at enhanced rates, previous notice of the demand for enhanced rent under Section 13 Act X of 1859 is not necessary. The suit itself is sufficient notice; and if the plaintiff is proved to be entitled to his demand, the decree for kubooleut at enhanced rent will not have retrospective effect, but will take effect from the commencement of the following year.

Jackson, J.—THIS was a suit to obtain a kubooleut from a tenant at enhanced rates.

The first Court tried it on its merits.

The Appellate Court dismissed it, because the plaintiff had not proved service of notice under Section 13 Act X of 1859.

On special appeal it is urged that, in such a suit, no notice is necessary, and that the Appellate Court should have tried it independent of the notice.

We are of opinion that, in a suit for a kubooleut, previous notice of the demand

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for enhanced rent under Section 13 is not necessary.* The suit itself is sufficient notice; and if the plaintiff is proved to be entitled to his demand, the decree for the kubooleut at an enhanced rent will not come into effect until the commencement of the year after the decree was passed. Such a decree will not have retrospective effect.

The case is remanded to the Judge for trial on its merits.

The 5th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Jurisdiction—Ejectment.

Case No. 3298 of 1863.

Special Appeal from the decision passed by the Principal Sudder Ameen of Hooghly, dated the 11th June 1863, reversing a decision of the Moonsiff of that District, dated the 18th March 1862.

Kally Doss Banerjee (Defendant) *Appellant,*

versus

Bonomalee Doss (Plaintiff) *Respondent.*

Roy Sreenath Sein for Appellant.

Baboo Kedarnath Muzoomdar for Respondent.

The Civil Court alone has jurisdiction in a case of dispossession between two ryots.

Steer, J.—THIS is a suit in which the plaintiff's allegation is that he has been dispossessed by another ryot. Both parties appear to be ryots of the same person, who is the zemindar, and he also holds a lakheraj mehal in the zemindaree. It is contended that there was an Act X case in which both plaintiff and defendant were parties; and that, though this fact was pleaded in bar before the Principal Sudder Ameen, he, without noticing this plea, decided for the plaintiff.

The same point in bar is urged as ground of special appeal.

But we hold that the suit before the Collector under Clause 6 Section 23 Act X of 1859 is no bar to the present action. The present dispute is between two ryots of in fact different estate, a zemindaree and a lakheraj mehal; and whatever may have been decided in the Act X case, it can never stand as an obstacle in the way of this suit. The Collector in the Act X suit was competent to decide between the zemindar and his tenant, or between the lakherajdar and his tenant; but where the question is, as it is in this case, whether the land sued for is the tenure of the plaintiff or of the defendant, it is a matter for the Civil Court, and no adjudication by the Collector as between a zemindar and his tenant can be regarded as a cause heard and decided by a Court of competent jurisdiction when the dispute to be decided is as to whether the land in dispute belongs to one ryot or to another.

There being no validity in the objection raised, we dismiss the special appeal with costs.

* *See* Sutherland's Full Bench Rulings, p. 183.

The 5th May 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Permanent Settlement (Date of)—Enhancement—Moostagirs—Ryots (Definition of)—Jungleboory tenants.

Case No. 234 of 1862 under Act X of 1859.

Regular Appeal from a decision passed by the Collector of Purneah, dated the 31st March 1862.

Baboo Dhunput Singh (Plaintiff) *Appellant,*

versus

Baboo Gooman Singh and others (Defendants) *Respondents.*

Messrs. R. V. Doyne and *H. Stainforth,* and *Baboos Banee Madhub Banerjee* and *Bungsee Buddun Mitter* for Appellant.

Mr. J. W. B. Money and *Baboo Poorno Chunder Mookerjee* for Respondents.

Suit laid at rupees 26,752-6-9.

The date of the Permanent Settlement held to be the 22nd March 1793.

Moostagirs are protected from enhancement, not as ryots, but as intermediate tenants, under Sections 15 and 16 Act X of 1859.

Definition of the word "ryots."

Jungleboory tenants are liable to enhancement.

Jackson, J.—THIS was a suit for enhancement of rent on the tenure of the defendants, alleged to comprise 11,645 beegahs of land called chukla Jhalounee, &c. The Collector dismissed the claim, on the ground that the defendants had paid the same fixed rent for the tenure for the last 70 years. This Court, on appeal, confirmed that decision, being of opinion that the defendants were ryots holding lands, the rent of which had not been changed for the last 20 years,

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or since the Permanent Settlement. A review was subsequently admitted to try the question whether the defendants came under the denomination of royts as alluded to in the commencing Sections of Act X of 1859; whether they do not more properly come within the category of under-tenants intermediate between the proprietors of the estate and the ryots; whether, as such under-tenants, their tenure is not liable to enhancement, looking to the terms of Sections 15 and 16 Act X of 1859, and more especially to the terms of the pottah on which the tenure was at first granted.

Mr. Doyne for the appellant contended that the holders of a tenure comprising 11,000 beeghs of land cannot, under any circumstances, be ryots; that the pottah on which this tenure was granted addressed the original lessee as moostagir; that the tenure is therefore one intermediate between the proprietor and the ryots, but that it does not come within the protected Sections 15 and 16 of Act X of 1859: 1*st*, because the pottah does not convey a permanent transferable interest in the land otherwise than under a terminable lease; and, 2*ndly*, because the pottah was given subsequent to the Permanent Settlement. Upon this latter point Mr. Doyne rested his client's right to enhancement especially upon the pottah, and urged that the pottah being forthcoming, the terms recorded in it are binding between the parties, whether as ryots or under-tenants of any description, and that there is no clause in the pottah fixing the rent of the tenure for ever or barring enhancement.

Mr. Money for the respondents stated that the defendants did come within the denomination of ryots, and that the evidence showed that they were khoodkasht ryots living on their land; that, as such, they held rights of occupancy from their status, independent of any terms contained in their pottah; that the rent had not been changed from the time of the Permanent Settlement, and that enhancement was consequently barred; that even if the defendants were not ryots, they were the holders of a jungleboory tenure, which, under the custom of the country, was a permanent hereditary tenure, the rent of which could not be enhanced.

The first question to be determined is whether the tenure commenced anterior or subsequent to the Permanent Settlement. The pottah is dated 11th Sawun 1199, which corresponds with the English year 1792. It was on this point urged that the Permanent Settlement was identical with the Decennial Settlement; that in fact it was the Decennial Settlement subsequently made perpetual; that the Decennial Settlement of this district was completed in 1789; and though it was not made perpetual until 1793, still the settlement which is now called the Permanent Settlement is that which was originally made, and must be held, therefore, to bear the date of the original settlement, *viz.*, 1789; that if this is the correct date of the Permanent Settlement, the protecting Clauses of Act X will not bar the enhancement of the rent of the tenure, whatever description of tenant the defendants may come under, as their own pottah is proof that the tenure originated subsequent to the settlement.

We think that the date of the Permanent Settlement must be held to be that on which, the Decennial Settlement being declared to be perpetual, the Permanent Settlement came into force. The proclamation which declared the settlement to be permanent is contained in Regulation I of 1793, and that Regulation distinctly lays down the date from which it is to have force and effect, *viz.*, the 22nd March 1793. In deciding this question, the Court cannot, as Mr. Doyne suggests, act upon the usual law of settlements and contracts, but must be guided by the distinct enactment of the Legislature which has declared the exact date when the Permanent Settlement came into force. The tenure, which is now in dispute we hold, has been proved to have commenced anterior to the Permanent Settlement, and it is not denied that the rent paid for it has remained fixed and invariable up to the present date.

The next question is whether the tenants are ryots, or tenants intermediate between the proprietor and the ryots. We cannot agree with the learned Counsel for the respondents that they are khoodkasht ryots. We think that this Court was in error in its first decision of this appeal in designating them as ryots at all. It is very difficult to lay down any general interpretation of the word "ryots." As a general rule, they are the cultivating tenants, but they may not be cultivators at all themselves; they may cultivate their land by hired labor or by under-tenants. In this case the amount of land included in the tenure is, we think, sufficient evidence that the tenants are not ryots, and that view is supported by the light thrown on the facts by the original pottah, which addresses the original lessee as moostagir, and directs him to take measures to have the land cultivated by hillmen as ryots, the land lying on the borders of the hill ranges in the north

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of the Purneah District. We think also that Mr. Money's contention that the tenants, from their status as holders of a jungleboory tenure, are protected from enhancement cannot be sustained. Mr. Money has not shown to us that jungleboory tenants have any such rights, but the Regulation which he alludes to in support of his views, *viz.* Section 8 Regulation VIII of 1793, contradicts those views, and states that such tenures are liable to enhancement, or, in the words of that Regulation, to all increases imposed on the Pergunnah generally.

The tenants in this case being declared to be intermediate between the proprietor and the ryots, it remains, lastly, to be considered whether they are protected from enhanced rent by Sections 15 and 16 Act X of 1859. Mr. Doyne argues that the tenure is not permanent and is not transferable, and that the protecting Clauses of those Sections do not refer to any tenures except those which are both permanent and transferable, and held otherwise than under a terminable lease. On the last point we cannot say that the present holders of the tenure hold under a terminable lease. They do not hold under the original pottah, because that pottah does not in any way refer to them, but only to the original lessee. The proprietors have allowed the present tenants to hold the tenure without any pottah, not for any short period of time, but for 50 years, ever since the decease of the original lessee; and during that time they have, in their receipts for rent and other documents, designated them as mokururee-dars; and so far from the tenure not being transferable, it is clear on the face of these proceedings, that the tenure has been transferred without objection on the part of the proprietors. More than 14 annas of the tenure has left the hands of the descendants of the original lessee, and been sold by public auction to new tenants, from whom the proprietors have received rent, and whom they now sue for enhanced rent. If, then, the proprietors have by their acts admitted that the tenure is transferable, and that it is mokururee, *i. e.* permanent, it is not for this Court to declare that the tenure is neither permanent nor transferable in a suit for rent in which those questions only incidentally arise. The proper tribunal to settle those questions is a Civil Court, not a Revenue Court under Act X of 1859. As far as the evidence before us goes, we think that the proprietors have admitted that the present tenants do hold a permanent and transferable interest in the land, and it is not shown that they hold under any lease at all, much less a terminable lease. They have not held since the Permanent Settlement, but under the law it is not necessary to show that they have held since that date. If the present tenant holds a tenure at a fixed rent which has not been changed from the time of the Permanent Settlement, that tenant is not liable to enhancement of such rent.

We think that the respondents in this case are, therefore, as far as the evidence before us goes, protected from enhancement, not as ryots, but as intermediate tenants, under Sections 15 and 16 Act X of 1859; and we accordingly dismiss this appeal, declaring all costs of this litigation, with interest at 12 per cent. per annum, payable by the appellants.

The 6th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Suit for share of rent.

Cases Nos. 1298 to 1301 of 1863 under Act X of 1859.

Special Appeals from decisions passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 22nd January 1863, affirming decisions of the Deputy Collector of that District, dated the 16th August 1862.

Umrit Chowdry and others (Defendants) *Appellants,*

versus

Syud Hyder Alli and another (Plaintiffs) *Respondents.*

Baboo Kissen Succa Mookerjee for Appellants.

Mr. C. Gregory and *Baboos Kali Kissen Sein* and *Debendro Narain Bose* for Respondents.

Shareholders whose shares are clearly ascertained may sue for their respective shares of the rent payable to them without waiting for the other parties entitled to rent joining in the suit, or without adding them as parties.

Levinge, J.—On the special appeal No. 1298 coming on for argument, it is admitted that our decision in this case will rule the special appeals in the remaining three cases, inasmuch as the same point is involved in all cases, each suit being identical, save that it is brought for the recovery of a different year's rent.

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The suits are brought under the provisions of Act X of 1859. The Lower Courts have affirmed the right of the plaintiff to recover; but it is contended before us, on special appeal, that an identical suit was brought by the same plaintiffs against the same defendants for rent, for a previous year, due out of the same land, on foot of the same agreement, and was heard in special appeal before this Court on the 20th March 1863, and that the cases now before the Court must be governed by that decision, which held that the plaintiffs had no right to recover.

But it has been shown to us that these cases now before the Court are clearly distinguishable from the one referred to. It would appear from the report of the case cited that the shares of the parties under the ikrarnamah were not defined, and that all proper parties were not before the Court; hence the suit was dismissed. But in these suits it is shown that the plaints state the proportion or share of the plaintiffs in the rent sued for to be a 2 anna 5 gunda share, and this share or interest has not been denied by the defendants. This removes one objection taken by the special appellants. Next it appears that the ikrarnamah defines the exact rent the defendants are to pay, *viz.* 4 rupees 10 annas per beegah. So we have the share ascertained and the rent; and as this fairly removes the defendant's objections, and distinguishes these cases from the one formerly before the Court, we have no hesitation in overruling these objections.

Next it has been said that all the parties are not before the Court. But we see no objection to the plaintiffs whose shares are clearly ascertained suing for their respective shares of the rent payable by the defendants under the agreement, without waiting for the other parties to join, who may be entitled to rent, or adding them as parties. In the case cited, the shares were stated not to have been apportioned; and therefore the suit could clearly not be maintained at the instance of the plaintiffs in those actions, for the reasons stated in the judgment of the Court. We have not overlooked the fact that all parties having *any interest* in the rents payable out of the land were before the Court, because they intervened; but as the plaintiff's shares of the rent are admitted, they need not join any other parties in their suit when they only sue to recover their own shares.

We have been asked to allow the special appellants to take an objection not urged before and not on the record, *viz.* that the plaintiffs ought to show that they, the defendants, neglected or refused to come to a partition as a condition precedent to the plaintiffs' right to enforce the rent sued for. But this permission we refuse, as the occupation and the rent due are both clearly established.

We dismiss these four special appeals with costs.

The 6th May 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge.*

Abatement of rent—Diluviated lands—Limitation.

Cases Nos. 1565 and 1566 of 1863 under Act X of 1859.

Special Appeals from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 26th February 1863, reversing a decision of the Moonsiff exercising the powers of a Deputy Collector at Seerajgunge, dated the 11th November 1862.

Mr. G. R. Barry (Plaintiff) *Appellant,*

versus

Moulvie Abdool Ali (Defendant) *Respondent.*

Mr. R. T. Allan and *Baboo Poorno Chunder Mookerjee* for Appellant.

Baboos Dwarkanauth Mitter and *Chunder Madhub Ghose* for Respondent.

A suit for abatement of jumma and refund of excess rents paid on account of diluviated lands is cognizable before the Collector under Clause 3 Section 23 Act X of 1859.

The right of action, when a diluvion takes place, accrues from the time when the plaintiff is compelled to pay the rent named in his pottah without the allowance of the abatement claimed by him.

Norman, C. J.—The plaintiff holds certain land under a lease from the defendant, containing the following stipulation:—"If any of the mehals or any portion of land of the mehals leased to you diluviate at any time within the term of this lease, you will obtain an abatement of your jumma in respect of such lands in proportion to the diluvion."

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He sues, alleging that diluvion took place, and, that he was compelled to pay an excess of rent for 1265 of Rs. 99, for 1266 Rs. 195-13, for 1267 Rs. 195-13, for 1268 Rs. 1,126-13-13, in all Rs. 1,617-7-13, which he claims to recover in this suit. It appears that the now defendant sued the plaintiffs for the rents of 1265 and 1266, in which the defendant obtained an order from the Collector allowing a deduction of Rs. 294-13 from the rents of 1265 and 1266 for the diluvion in those years. But the Collector's order was reversed on this point by the late Sudder Court on the 5th of October 1861, as appears by the Reports, S. D. A., for that year, p. 149; the Court then saying that, as the item was disputed by the plaintiff, "the defendant must take proper steps to establish the fact by suit, if necessary, as it will involve, if proved, a permanent reduction of the rent." We do not feel quite satisfied that the Court might not have admitted the claim to a reduction of the rent in that suit.

The Deputy Collector thought that the claim was barred as to the rents for 1265, 1266, and 1267, but gave the plaintiff a decree for the over-payments for the year 1268. On appeal the Judge reversed the decision of the Deputy Collector, thinking that it was not a suit cognizable under Act X.

We think, however, that the suit was one properly cognizable before the Collector under Section 23 Clause 3. The plaintiff complains of an excessive demand of rent and pray for an abatement and a refund of the sum which was exacted from him.

The second point to which our attention has been called is whether the suit, as to any portion of the demand, is barred by limitation under Section 30 of Act X of 1859. We think it is not. No doubt, when a diluvion took place, the plaintiff may have had a right of suit to obtain an abatement of his jumma, if the zemindar had refused, after a reasonable request for that purpose, to grant such abatement. But he was not bound to sue for that purpose. He was not actually injured until compelled to pay the rent named in the pottah without the allowance of the abatement he claimed. Upon that payment having been extorted from him, he had a new right of action, and as the suit would appear to have been brought within one year from that date, we think it was in time.

The case must, therefore, be remanded for trial on the merits, when a local investigation under Section 73 may be made, if necessary.

The 6th May 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Rent—Discharge—Presumption.

Case No. 337 of 1862.

Regular Appeal from a decision passed by the Assistant Collector of Shahabad, dated the 25th April 1862.

Mr. R. Solano (Defendant) *Appellant,*

versus

Doolhin Umrit Koer, and after his demise Probhoo Doss (Plaintiff) *Respondent.*

Mr. R. T. Allan for Appellant.

Baboo Mohendro Lall Shome and *Moulvie Murhumut Hossein* for Respondent.

In a former suit an usufructuary mortgagee sued his mortgagor and the Government as having taken the management of the latter's estates into its own hands for the mesne profits of his mortgaged property during the period of his dispossession by the mortgagor. That suit was compromised by a money payment by Government in lieu of all rents actually collected, and by the transfer to the mortgagee of the right to the outstanding arrears. The mortgagor now sues his lessee for the rent paid by him to the Government. HELD that the lessee was not liable in respect of rents the mortgagor's claim to which had already been satisfied by Government.

The payment of the entire rent of a subsequent year affords a presumption in favor of the payment of the rent for the previous year.

Steer, J.—THIS is a suit for arrears of rent of 1262, 1263, and 1264.

It appears from the result of a former suit of 14th July 1857, S. D. A. Reports, page 1232, that the plaintiff in this case held the mortgage of an estate under the late Koer Sing on these terms—that, in consideration of a certain sum of money advanced to the said Koer Sing, he was to hold the estate for a certain fixed period, taking the usufruct in lieu of interest.

Koer Sing dispossessed the plaintiff in the beginning of 1262, and brought the suit of which mention has been above made, in which it was his object to show that the debt due originally to the plaintiff had been more than satisfied by the usufruct of the estate. The suit terminated in its being held that the plaintiff was entitled to hold until the expiration of the full term stated in his lease, and he was not subject to account.

The Government, in the beginning of 1264, had, with a view to extricate Koer Sing out of the troubles he was in on account of the largeness and pressing nature of his debts, taken the management of all his estates into its own hands; and the present plaintiff, after he had succeeded in his suit in establishing what the nature of his tenure was,

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instituted another suit against the Government and Koer Sing to recover from them the mesne profits of his mortgaged estate during the period of his dispossession. This suit was compromised by the payment of a large sum of money down, and the transfer to the plaintiff of the right to the outstanding arrears due from the ticcadars and the tenants of the estate.

Mr. Solano, the defendant, held a ticca lease within the mortgaged estate, and the plaintiff now sues him on the averment that he failed to discharge his rents for 1262, 1263, and 1264.

Mr. Solano replies that he paid the whole of his rents for 1262 and 1263 to Koer Sing and to the Government, and that, being dispossessed in 1264, he was discharged from any further obligation to pay rent.

The case was once decided by the Deputy Collector and remanded by this Court. On the remand, the Deputy Collector finds the statement of the defendant to be substantially correct, and he disposes of the suit by dismissing it.

The plaintiff, who is now the appellant, urges that Mr. Solano being his lessee and under written obligation to pay him rent, must be bound by his contract, and that payment to any one else is not an authorized payment, and is not therefore a discharge as far as the plaintiff is concerned; and, in support of this view of the case, he produced a decision of this Court dated 5th May 1862.

We do not think that, under the circumstances of this case, such an argument will hold good, for the plaintiff under an agreement with Government agreed to sue the tenants of the estate for any outstanding arrears in lieu of any claim he might have against Government or Koer Sing. The plaintiff took from Government a large sum of ready money and the outstanding arrears of rent in consideration of his claim of wasilat. What Government had collected already was no outstanding arrear; so if Mr. Solano can show that he paid the rents of 1262, 1263, and 1264 to Koer Sing or to the Government, the plaintiff can have no claim against him. As wrong-doers the plaintiff sued Koer Sing and the Government for the mesne profits of his estate, which included the sums realized from the tenants as rent, and his claim has been amicably settled. By this settlement he was left at liberty to realize existing arrears, and he now stands with regard to the tenants as the Government stood. What Government could claim, he can claim; and what Government cannot claim, he cannot claim. Now, it is clear Government could not claim rents which they had once recovered; and if Mr. Solano can show he has paid his rents to Government, he is discharged.

With respect to the rents of 1262 and 1263, we think the evidence in regard to the payment for the last year, afforded by the Collector's rooboocaree, to be complete and satisfactory. In regard to the rents of 1262, there is admittedly good evidence as to the payment of a great portion of it, and the payment of the entire rents of the year subsequent affords a presumption in favor of the payment for the year previous.

We think, then, that these payments are a sufficient and legal discharge to Mr. Solano in regard to the rents for those two years. The Government has satisfied by a money payment all the plaintiff's claim for mesne profits on account of rents actually collected; and the rents of Mr. Solano for 1262 and 1263 having been among the rents which Government collected, the plaintiff's claim on account of these rents has in effect been satisfied.

With regard to the ground on which exemption is claimed for 1264, the evidence adduced does not satisfy us that Mr. Solano was out of possession. If he was, it was a voluntary act on his part which will not exempt him from the payment of rent. It is not as a fact at all probable, nor was there the slightest reason why Mr. Solano should, on the assumption of the management by Government, have yielded up possession. On the contrary, the Government surburakar was directed to respect all existing tenures, and to receive rents from the farmers and other intermediate holders. We think, then, he has shewn no good ground for the exemption he claims; and as there is no question as to the amount of rent claimable for this year, Mr. Solano must be held liable for it.

We, therefore, modify the order of the Lower Court. The claim is dismissed in regard to the years 1262 and 1263, and decreed in regard to the year 1264, with costs in proportion; and we need hardly say, after this expression of our view, that we consider that there was no grounds whatever for the imputation which the Lower Court, in its first judgment, made against Mr. Solano, to the effect that he had been guilty of unprincipled conduct as evidenced by the facts of this case.

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The 11th May 1864.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Estoppel — Section 97 Act VIII of 1859—Possession—Rent.

Case No. 2228 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 29th April 1863, *affirming a decision of the Deputy Collector of that District, dated the 31st January* 1863.

Ram Kishore Mundle (Plaintiff) *Appellant,*

versus

Moorad Mundle (Defendant) *Respondent.*

Baboo Debender Narain Bose for Appellant.

Baboo Bhuggobutty Churn Ghose for Respondent.

There is nothing in Section 97 Act VIII of 1859 to prevent a suitor from instituting a claim for possession and afterwards bringing one for rent.

Glover, J.—SPECIAL appellant in this case (plaintiff in the Court below) sued to recover arrears of rent on a jote occupied by the special respondent. The defence was that the holding was a mourosee one, and the rent fixed much less than that claimed.

The Court of first instance (Deputy Collector) decreed the claim; but on appeal to the Judge, the case was remanded. On the second trial, the Deputy Collector held the kubooleut on which the plaintiff sued to be false, a decision upheld by the Judge on appeal.

It is urged before us in special appeal: (1) that the allegation of relinquishment on the part of the special appellant, as it was denied by the ryot (special respondent) himself, could not operate by way of estoppel; and (2) that the withdrawal of a suit under Section 97 of Act VIII of 1859 does not bar the institution of another and different suit.

It appears that this suit is mixed up with another between the same parties; and the Judge, on referring to that case, instead of detailing the whole circumstances, has rendered his decision in this suit almost unintelligible. We think, however, that he has decided the case on facts shewn by the evidence; and that, although he has laid considerable stress on the special appellant's allegation that the jote was given up by the ryot (special respondent), and on the withdrawal under Section 97 of Act VIII of 1859, he did not actually decide the case for those reasons.

Had he done so, there might have been grounds for special appeal; for the so-called relinquishment could not affect the decision of this case on its merits (the special respondent denying the allegation), although, of course, it would have rendered the claim itself suspicious; and there is nothing in Section 97 Act VIII of 1859 to prevent a suitor from instituting a claim for possession and afterwards bringing one for rent. It is quite possible that a landlord might, in the first instance, consider the tenant in the light of a mere trespasser and sue to eject him, and afterwards find that he had a right of occupancy and so decide on suing him for rent; and it cannot be said that a withdrawal (on permission) of the first suit under Section 97 would prevent the institution of the second.

Looking to the whole case, therefore, whilst we admit that the Judge's decision is vague and unsatisfactory, we think there is sufficient to show that he decided the case on the general facts as proved by the evidence, and not upon the points urged in special appeal.

We, therefore, dismiss this appeal with costs.

The 11th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Evidence—Reception of documents (after filing of plaint).

Case No. 1341 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 25th March 1863, *reversing a decision of the Collector of that District, dated the 14th July* 1862.

Mr. F. A. Lopez (Defendant) *Appellant,*

versus

Mr. J. H. Driberg (Plaintiff) *Respondent.*

Baboos Chunder Madhub Ghose and *Kishen Succa Mookerjee* for Appellant.

Mr. R. T. Allan for Respondent.

Act VIII of 1859 gives a discretionary power to a Court to receive documents after filing of plaint.

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Levinge, J.—THE first Court clearly declined to act on the khusrah for insufficient reasons. The Court ought, *after having received the document*, to have disposed of it on some good ground, and not capriciously rejected it for the very insufficient reasons stated. The defect of the judgment is that it gives bad reasons. Upon appeal the Judge remanded the case for a further investigation, telling the Lower Court to receive and deal with the document legally, not fettering the Court by laying down any rule for its guidance, but leaving it quite at liberty to give weight or not to the paper; and from this order the defendant has appealed specially, and we are of opinion that there exists no foundation for that appeal.

The second ground of appeal is clearly untenable, as it simply raises the point that the Court had no power to receive this document, as it was not filed with the plaint; but Act VIII of 1859 gives a discretionary power to the Court, which cannot be controlled under the circumstances of this case. We dismiss this appeal with costs.

The 11th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Special Appeal—Damages—Section 2 Act VI of 1862 B. C.

Case No. 1394 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 13th February 1863, reversing a decision of the Deputy Collector of that District, dated the 20th September 1862.

Maharajah Dheeraj Mahatab Chand Bahadoor (Plaintiff) *Appellant,*

versus

Debender Nath Thakoor and others, (Defendants) and Mr. G. F. Lord, Superintendent of the Bengal Coal Company (Objector) *Respondents.*

Baboos Juggadanund Mookerjee and *Chunder Madhub Ghose* for Appellant.

Mr. Fergusson and *Baboo Banee Madhub Banerjee* for Respondents.

The refusal of a Court to award damages under Section 2 Act VI of 1862 B. C. is not a ground for special appeal.

Steer, J.—WHERE a tenant has, without reasonable or probable cause, neglected to pay his rents, and to tender or to deposit them, he may be subjected to damages under Section 2 Act VI of 1862 of the Acts of the Lieutenant-Governor of Bengal in Council; but it is still discretionary with the Court to give damages or not. Therefore, if a Court, for reasons assigned, does not give damages, that fact cannot form a ground for special appeal; nor is it a proper ground for special appeal, whether the Judge was right in holding that the defendant in this case did not withhold his rents save for reasonable and probable cause. What is probable and reasonable cause depends on evidence; and whether that evidence establishes a probable and sufficient cause is a matter of fact, and not open to special appeal.

We, accordingly, dismiss the special appeal with costs.

The 11th May 1864.

Present:

The Hon'ble W. Morgan and Shumboonauth Pundit, *Judges.*

Ejectment—Section 25 Act X of 1859.

Case No. 2199 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 15th May 1863, reversing a decision of the Deputy Collector of Buxar, dated the 22nd January 1863.

Sheo Ruttun Sing and others (Defendants) *Appellants,*

versus

Phool Koomaree and others (Plaintiffs) *Respondents.*

Baboo Khetternath Bose for Appellants.

Baboo Kalee Kissen Sein for Respondents.

An ejectment by a zemindar without application made to the Collector under Section 25 Act X of 1859 is not necessarily an illegal ejectment. The illegality of the ejectment must be established by evidence.

Morgan, J.—WE must remand this case. The suit was brought by the plaintiff under Clause 6 Section 23 of Act X. 1859, to recover the occupancy of land from which he had been, as he alleged, illegally ejected. The plaintiff's case was that his tenure was goozushta pywusta, which is a tenure of a permanent nature. The defendant (who was the landlord or zemindar) denied this, and said that the plaintiff's was a shikmee tenure, and that on the determination of the tenancy

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he (the landlord) was entitled to recover the property. The decree of the Court of first instance was that the tenure was not a tenure such as the plaintiff claimed, but a shikmee tenure of a determinable kind, and the plaintiff's suit was dismissed. The whole matter in dispute there appears to have been the nature of the plaintiff's tenure, the plaintiff contending that he had been ejected illegally, because his tenure was one which entitled him to retain the property.

The Court of Appeal, without determining the nature of the tenure, proceeds upon the assumption that there had been an illegal ejectment of the plaintiff from the land. The Judge refers to Section 25, which provides that a zemindar or other person in receipt of rent, *if he requires assistance to eject a cultivator not having a right of occupancy*, shall make application to the Collector. The Judge holds that, the plaintiff having been ejected by the defendant without application made to the Collector, he was illegally ejected, and that therefore he was entitled to a decree to recover possession. It is not found that the landlord took any illegal measures to eject the tenant. If he was a tenant not having a right of occupancy, and the term had expired, the landlord had a right to the property and might take possession, provided he used no improper means to obtain it. The Judge in his judgment says :—" It was sufficient if he (the plaintiff) made out the fact that he was in previous possession, and was no longer so at the date of the cause of action." But that is by no means sufficient. The plaintiff must establish that he was illegally ejected from his tenure. Section 25, to which the Judge refers, provides only that, if the zemindar requires assistance to eject a cultivator, he must apply to the Collector. It does not appear here that the Collector's assistance was required. If any illegality was committed by the defendant in obtaining possession of the property on the determination of the ryot's tenure, it must be established by evidence. The mere fact that the plaintiff no longer possesses what he once possessed, is insufficient to show that he has been " illegally ejected."

We reverse the judgment of the Lower Appellate Court and remand the case, in order that the Judge may try whether the plaintiff has been illegally ejected from the land. In order to ascertain this, it may be necessary to enquire whether the tenure is a goozushta pywusta tenure, as the plaintiff alleges, or whether it is a determinable tenure. If the zemindar has used any illegal means to recover possession, then, possibly, having failed to observe the provisions of Section 25, he may not be able to resist the present suit.

We will remand the case for that purpose.

The 13th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Limitation—Section 32 Act X of 1859.

Case No. 1458 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of the 24-Pergunnahs, dated the 3rd February 1863, *affirming a decision of the Deputy Collector of that District, dated the 24th October* 1862.

Ranee Kashishuree Dossee and others (Defendants) *Appellants,*

versus

Ram Sagur Singh (Plaintiff) *Respondent.*

Baboo Hem Chunder Banerjee for Appellants.

Mr. R. E. Twidale for Respondent.

Where a suit was brought within 3 years from the passing of Act X of 1859 for arrears of rent of 1266 to 1268 and 3 months of 1269,—HELD that the suit was not barred by limitation under Section 32, and that the claim for the arrears of 1266, which were not due till 1267, was in time, though that was a period preceding the passing of the Act.

Steer, J.—THE plaintiff sued for arrears of rent from 1257 to 1269, and the Lower Court has decreed them in his favor.

The point in special appeal is the application of the rule of Limitation to the plaintiff's claim, as laid down in Section 32 Act X of 1859.

The suit was instituted on the 31st July 1862 ; and by Section 32 Act X of 1859 any arrear due at the passing of the Act, *i. e.*, on the 29th April 1859, ought to have been sued for within 3 years from that date. A question was raised as to whether the plaintiff was not entitled to some of the arrears which were due prior to the 29th April 1859, but the pleader for the plaintiff gave up this point, as well as all the claim of rent *due* at the above date.

The arrears due subsequent to the 29th April 1859 sued for are those of 1266, 1267, 1268, and 3 months of 1269, in all 3 years and 3 months ; and we have to consider whether 3 months of this claim, that is, the

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first 3 months of it, is not barred by reason of the suit not having been instituted for them within 3 years from the passing of the Act.

The law says that "suits for the recovery "of arrears of rent shall be instituted "within 3 years from the last day of the "Bengal year in which the arrear claimed "shall have become due."

Now, the arrears of 1266 were not due till 1267; and if from 1267 the term of 3 years has not more than expired before the suit is brought, the claim for the arrears of 1266 is in time, though that is a period preceding the passing of the Act. Therefore, this suit which was brought within that period is in time, and the plaintiff is entitled, there being no question that the rents are in balance, to a decree for the rents of the entire 3 years and 3 months for which his suit is brought.

We, accordingly, modify the judgment of the Lower Court, and decree to the plaintiff the rents in arrears for 1266, 1267, 1268, and 3 months of 1269, as sued for, with interest on each year's rent at 12 per cent. from the expiration of each year, and a like rate on the 3 months of 1269, and costs in proportion.

The 16th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Case No. 1391 of 1863.

Limitation—Section 140 Act X of 1859—Distraint.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 23rd February 1863, *reversing a decision of the Moonsiff of that District, dated the 13th June* 1862.

Pran Kissen Roy and others (Defendants) *Appellants,*

versus

Kistomonee Debea and others (Plaintiffs) *Respondents.*

Baboo Kishen Sukha Mookerjee for Appellants.

Baboo Tarucknath Sein for Respondents.

Where a zemindar distrains the crop of a piece of land, and two different parties each claim to be the tenant of it, neither of them is barred by the limitation laid down in Section 140 Act X of 1859 which only applies to the case of two rival zemindars claiming the rent of the same piece of land.

Steer, J.—It appears that one Greesh Chunder, a putneedar, distrained the crops of Kistomonee and others and realized his rents. Pran Kissen and Neel Madhub made, it is said, some opposition, but without any effect.

They then brought a suit, so it is again said, under Section 140 Act X of 1859, to contest the distraint on the ground that the lands, the crops of which had been distrained, had been sold to them previously by Kistomonee.

How the Collector came to entertain such a suit under Section 140 Act X of 1859, it is not easy to reconcile with the facts as above stated to us; but he did entertain the suit, went into the question whether Kistomonee did in fact sell the lands to Pran Kissen and Neel Madhub; and finding on that fact against the latter, he dismissed their suit.

On appeal this decision was affirmed by the Judge.

The present suit is brought in the Civil Court by Kistomonee on the allegation that Pran Kissen and Neel Madhub, who held the mortgage of the lands, now falsely assert that they bought them of her out and out, and on this allegation refuse to give her possession.

Pran Kissen and Neel Madhub reply that they hold the lands under a bill of sale made to them by the plaintiff.

The first Court found that there had been a nominal sale between the parties, but no money passed under it. Not regarding it, then, as a sale, the Court decreed the suit in favor of the plaintiff Kistomonee.

The defendants Pran Kissen and Neel Madhub appealed to the Principal Sudder Ameen, who, referring to the suit between the same parties before the Collector, remarks:—"It is evident that the assertion of purchase "by the defendants was, on the 6th January "1860, overruled by the decision of the "Deputy Collector, which decision in appeal was upheld by the Judge of this "zillah, and the defendant Neel Madhub "having failed within the time prescribed "by Section 140 Act X of 1859 to contest "the said summary decision, it has become "final. The allegation of purchase by "Neel Madhub is therefore necessarily inadmissible."

This judgment evinces a strange misapprehension of the law on the part of the Principal Sudder Ameen. Section 140 Act X of 1859 contemplates the case of two rival zemindars claiming the rent of the same bit of land. In such a case, if the

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Collector decides that the rent properly belongs to *A*, and *B* does not bring his suit to establish his title to the rent of the land within one year from the date of the decision, his remedy would, by the above Section, be lost. But in the present case, there never was a question between two rival zemindars who each claimed the same rent for the same bit of land; but the question involved concerned two parties, who each asserted a right of being regarded as the tenant of the same bit of land; and whether by any mistake of fact or law, their case was dealt with by the Collector as one coming under the provisions of Section 140 Act X of 1859, the fact of the Collector assuming jurisdiction where he had none, cannot bar the right of suit of either party who seeks to establish in the Civil Court the question of ownership. Where two zemindars claim the ownership of the land, the crops of which have been distrained for rent, the zemindar who is declared not to be entitled by the Collector, must, under Section 140, sue to establish his right in the Civil Court within one year from the date of the decision. But where a zemindar distrains the crop of a bit of land, and two different parties each claim to be the tenant of it, neither of them is barred by the limitation laid down in Section 140, for the Section is altogether inapplicable to them.

The case must therefore be remanded to the Principal Sudder Ameen to try the question whether there has been in fact any sale of the property in suit between Kistomonee on one side, and Pran Kissen and Neel Madhub on the other, and for disposal accordingly.

The 19th May 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Permanent Settlement (Date of—referred to in Sections 3 & 5 Act X of 1859).

Case No. 289 of 1862 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 30th November 1861, affirming a decision of the Collector of that District, dated the 8th August 1861.

Mussamut Poran Bebee (Defendant) *Appellant,*

versus

Sedee Nazir Ally Khan (Plaintiff) *Respondent.*

Baboos Unnoda Pershad Banerjee, Dwarkanath Mitter, and *Onoohool Chunder Mookerjee* for Appellant.

Baboos Kally Mohun Doss, Banee Madhub Banerjee, and *Kishen Mohun Mookerjee*, and *Moonshee Ameer Ali* for Respondent.

"The time of the Permanent Settlement" mentioned in Sections 3 & 4 Act X of 1859, was held to be the date of the Permanent Settlement of the Provinces of Bengal, Behar, and Orissa referred to in Regulation I. 1793, and not the date of the actual settlement of a particular zemindary with the owner thereof.

Norman, C. J.—In this case, which had been remanded by Sir Barnes Peacock and Mr. Justice Kemp in March 1863, the plaintiff sued to enhance the rents of certain lands formerly pykan, but resumed by the Government and granted to the ancestors of the defendant in 1797 by a pottah which the Lower Courts find to have been granted by the Collector for the Courts of Wards at a jumma of rupees 165. The Rajah plaintiff being at that time an infant, the settlement was made by the Government with him as zemindar in 1208 *i. e.* A. D. 1801. The Judge having held that the plaintiff was entitled to enhance, the defendant objected before us.

First.—That the rent having been fixed before the actual settlement with the zemindar, the plaintiff is precluded from enhancing by Section 4 of Act X of 1859.

But we are of opinion that "the time of the Permanent Settlement" mentioned in that Act must be taken to be the same as that referred to in Section 3, and is the date of the Permanent Settlement of the Provinces of Bengal, Behar, and Orissa referred to in Regulation I of 1793, and not the date of the actual settlement of the particular zemindaree with the owner thereof; and therefore, that, as the rent was fixed in this case subsequently to the date of the Permanent Settlement of those Provinces, it is liable to enhancement.

Secondly.—It was contended that the lands in respect of which the rents were payable were not settled with the zemindar as part of his zemindaree, but only the jumma or rent of rupees 165 payable in respect thereof, which was settled as part of a large jumma of rupees 4,610, and was assigned to the zemindar in trust to collect the same and thereout to maintain pykes and ghatwals.

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But, on a careful examination of the kubooleuts and dowls, we find nothing to show that these lands are excepted from the settlement of the zemindaree of Midnapore. The alleged exception amounts to no more than that the Government say "of your total old jummah or gross rental of rupees 1,11,796, rupees 85,000 are to be paid to us, rupees 4,610 for the maintenance of 1,719 pykes and ghatwals, and the residue, rupees 22,186, shall be remitted on various grounds."

The appeal is, therefore, dismissed with costs and interest.

The 19th May 1864.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Section 77 Act X of 1859 — Intervenor.

Case No. 2986 of 1863.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 20th August 1863, *reversing a decision of the Moonsiff of Kandy, dated the 23rd July* 1863.

Syed Mehdee Ali Khan (Plaintiff) *Appellant*,

versus

Doorga Doss Shidanto and others (Defendants) and the Nawab Nazim of Bengal (third party) *Respondents*.

Mr. R. T. Allan and *Baboos Obboy Churn Bose* and *Chunder Madhub Ghose* for Appellant.

Baboos Kishen Kishore Ghose, Sham Lall Mitter, Sreenath Doss, and *Huro Kallee Ghose* for Respondents.

Where the right to receive the rent is not disputed in a suit between the landlord and the tenant, the event upon which Section 77 Act X of 1859 gives a third party the right to intervene does not arise.

Norman, C. J.—This is a suit for the rent of 1270. The ryot did not deny the right of the plaintiff to the rent, but pleaded poverty, and alleged that he had paid some rent to the Nawab Nazim of Bengal during the year 1269. The Nawab Nazim then claimed to intervene under Section 77 of Act X of 1859. The Moonsiff of Chowkee Kandy, Baboo Khettermohun Hattee, very properly gave the plaintiff a decree; but the Judge, on appeal by the Nawab Nazim, reversed this decision, holding that the plaintiff was not in possession, and that the plaintiff had admitted that the claimant had realized rents during the past year.

We are of opinion that his decision was erroneous. *The right to receive the rent was not disputed in the suit between the landholder and the ryot*, and therefore the event upon which Section 77 gives to the claimant a right to intervene never arose. We therefore reverse the decision of the Judge and affirm that of the first Court with costs and interest.

It is not necessary to go into another point taken, that, as the suit is for an amount under 100 rupees, there is no appeal.

The 21st May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges*.

Right of occupancy—Sub-lessee.

Case No. 2068 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 23rd April 1863, *reversing a decision of the Deputy Collector of that District, dated the 14th February* 1863.

Mr. D. N. Gilmore (Plaintiff) *Appellant*,

versus

Surbessuree Dassee and others (Defendants) *Respondents*.

Baboo Juggodanund Mookerjee for Appellant.

Moulvie Murhumut Hossein for Respondents.

A sub-lessee from a ryot having a right of occupancy can gain no right of occupancy for himself under Section 6 Act X of 1859.

Steer, J.—This is a suit under Clause 6 Section 23 Act X of 1859 to recover possession of land from which the plaintiff alleges he has been illegally ejected by the person entitled to receive rent for the same.

That person is, we find, a mere tenant himself, paying his rents to the zemindar; and the plaintiff holds his lands from him. The plaintiff is therefore a sub-lessee from a ryot having a right of occupancy, and he has acquired, in such a position, no right of occupancy for himself. This is clear from the latter part of Section 6 Act X of 1859, and it has been laid down as law by the Chief Justice in the leading case of James Hills *vs.* Issur Ghose, where it is stated "that a ryot who gains a right of occupancy "by Section 6 is not precluded from

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"determining the tenancy of another ryot to "whom he may have sub-let, and who, by an "occupation of 12 years, gains no right of "occupancy against him."

These were not the grounds exactly on which the Lower Court dismissed the plaintiff's suit; but the order of dismissal was right, and we reject the special appeal with costs.

The 21st May 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Damages—Section 2 Act VI of 1862 B. C.

Case No. 2115 of 1863.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 28th April 1863, affirming a decision of the Deputy Collector of that District, dated the 27th August 1862.

Gopal Lal Thakoor (Plaintiff) *Appellant*,

versus

Mahomed Kadir and others (Defendants) *Respondents*.

Mr. R. T. Allan and *Baboo Kally Mohun Doss* for Appellant.

Baboos Hem Chunder Banerjee and *Romesh Chunder Mitter* for Respondents.

Under Section 2 Act VI of 1862 B. C., it is discretionary in the Judge to award damages.

Glover, J.—THIS is an appeal on the question of damages. Special appellant maintains that the Lower Appellate Court was bound to apply the provisions of Section 2 Act VI of 1862, and award damages against the recusant ryot. The wording of the Act makes it clearly discretionary in the Judge to award such damages: and under the circumstances, and as it was lawful for the Judge to give damages or not as he thought fit, and as we see that he did exercise his judgment in the matter, no ground of special appeal arises. Dismissed with costs.

The 30th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges*.

Section 77 Act X of 1859—Intervenor.

Case No. 2394 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Sarun, dated the 16th May 1863, reversing a decision of the Deputy Collector of that District, dated the 26th November 1862.

Bebee Noor Jahan (Defendant) *Appellant*,

versus

Mutty Lall Sahoo (Plaintiff) *Respondent*.

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Kallee Kishen Sein for Respondent.

According to Section 77 Act X of 1859, in a suit for rent in which a third party intervenes, the only question for decision is whether the plaintiff or the intervenor is in the actual receipt and enjoyment of the rent.

Steer, J.—THE plaintiff sued a ryot for rent. The ryot did not appear, but a third party intervened, and the case became one to which the provisions of Section 77 Act X of 1859 applied. The point, then, which the Judge had to decide was the question whether the plaintiff or the third party was in the enjoyment of rent. There may be no question as to the plaintiff's right as a co-sharer of the estate to receive his share of the rent; but where it is alleged, as it has been in this case that, by a private arrangement, the third party is in the receipt and enjoyment of the rent, the only question to decide is whether the plaintiff or the third party has received the rent.

The Judge has decided the case on quite another principle. Considering that the plaintiff is a co-sharer, and considering that the third party gave no reliable evidence of the partition which, he said, had been made between him and the plaintiff, the Judge thinks the plaintiff entitled to a decree for the rent; but in a case for rent, as already observed, the actual receipt and enjoyment of rent is the only point for enquiry; and the Judge ought, therefore, to have confined his enquiries, as the first Court had properly done, to the ascertainment of this point alone. The first Court found as a fact that the plaintiff was not in possession, and the Judge does not displace this finding. The plaintiff not being in possession, he has no title in this action to the rent; and we accordingly consider the judgment of the first Court to be perfectly correct, and the Judge's decision to be incorrect. In this view we uphold the first Court's decision, and reverse the decision of the Judge, with costs against the plaintiff, special respondent.

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The 30th May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Enhancement—Middlemen.

Case No. 11 of 1864 under Act X of 1859.

Regular Appeal from a decision passed by Mr. R. T. Sevestre, Deputy Collector of the 24-Pergunnahs, dated the 15th October 1863.

Jadub Chunder Haldar (Defendant) Appellant,

versus

Ishoree Lushkur and others (Plaintiffs) Respondents.

Baboos Unnoda Persad Bannerjee and *Sreenauth Doss* for Appellant.

Baboos Dwarkanath Mitter and *Kadernath Muzoomdar* for Respondents.

A middleman is liable to enhancement when the productive powers of his land have been increased otherwise than by the agency or expense of the ryot. Two-thirds was held to be a fair proportion of the surplus profits of the land to be awarded to the landlord.

Levinge, J.—THIS case was remanded by the High Court by order dated the 14th May 1863, with the following observations:—"In the matter of rates, the defendant avers that they range from a maximum of Rs. 5 to a minimum of Rs. 2; the plaintiffs from Rs. 2-10 to Re. 1-10 per beegah. The Deputy Collector, without recording any reasons for so doing, assumes the Government jummabundee rates, with half as much again added to them, to be fair and equitable rates. We consider that the value of the produce and the productive powers of the soil have been undoubtedly increased by the erection of an embankment on the part of Government, and the plaintiffs must therefore pay a fair and equitable increase in the rates hitherto paid by them. We therefore remand the case in order that the Lower Court may decide the case with reference to the above remarks, and fix the rate upon some better data than the arbitrary one assumed. The rates prevailing in the neighbouring khâs mehals for lands of a similar description and enjoying similar advantages, will form a good guide to the Lower Court in fixing what is a fair and equitable rate."

In accordance with the order of remand, the Deputy Collector has passed the decision now under appeal, and has found, having regard to the above instructions, that the average rent per beegah of paddy land is Rs. 4-3-6, and that finding we uphold.

He has further found that the ryot, according to the jummabundee rate, has to pay at present Re. 1-13-6 per beegah, leaving Rs. 2-6 gain or profit on each beegah which the ryot receives from the under-tenant. But in point of fact, the plaintiff pays at the "hustabood," a trifling lower rate than the jummabundee, making a slight difference in the total jumma mentioned in the jummabundee. The Deputy Collector has only increased the rent to be paid to the zemindar, the defendant, for the paddy land, by the sum of 4 annas per beegah, thus giving to the zemindar a fraction less than Rs. 2-1-6 per beegah, and allows the plaintiff to retain something over Rs. 2-2 profit derived from the under-tenures, in our opinion altogether out of proportion to what the landlord is entitled to receive and the middleman to retain. We are left without a guide in fixing what proportion of the profits we should award to the defendant, the zemindar, inasmuch as the plaintiff is a middleman. The Deputy Collector finds that the actual cultivators of the soil are the under-tenants, that is, tenants to the plaintiff. The defendant took this land in farm from the Government after the occupancy of the plaintiff as ryot, the plaintiff not having been restricted from sub-letting to cultivators. Act X of 1859 recognizes different classes of ryots, as appear by reference to the 17th Section of the Act, and the class to which the plaintiff belongs appears to be simply that of middlemen, or ryots who do not cultivate the land which they hold direct from their landlords, but sub-let it to the actual cultivators, and receive from them a clear and certain sum as profit or rent.

The plaintiff in this case is clearly liable to have his rent enhanced under the provisions of the abovementioned Section, as the productive powers of the land have been increased otherwise than by the agency or expense of the ryot, *viz.* by the Government improvements. This is established by the evidence in the case, the finding of the Deputy Collector, and the decision of this Court under the order of remand. It appears that many individuals belonging to the same class of ryots as the plaintiff, are to be found holding land in the neighbouring Government khâs mehals; but unfortunately the rents they pay to their landlords afford to the Court no guide in this case, in fixing the rent the plaintiff should pay to the defendant, inasmuch as, although their lands have been improved, their rents have not been enhanced. If their rents had been raised, and the

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amount thus fixed been acquiesced in, that rate would have afforded the Court a data upon which to fix the plaintiff's rent, as appears by reference to the 2nd Clause of the 17th Section of Act X., inasmuch as the fact of the prevailing rates paid by the *same class* of ryots for land of a similar description with similar advantages in the places adjacent, affords a good ground for raising the plaintiff's rent, and this appears to have been the criterion for raising the plaintiff's rent contemplated by this Court under the order of remand.

We have endeavoured, by a postponement, to get the parties to compromise their differences, and to agree to a fair and equitable rate of rent and make their own contract; but having failed to get the parties to agree, we are bound to pass a decree in this case amending the decision of the Deputy Collector, being satisfied that it is inequitable to allow so large a share of the profits of the land to remain with the plaintiff. We think it but fair to award to the landlord two-thirds of the surplus profit that remains after deducting the rent hitherto paid per beegah. We accordingly hold that the plaintiff is liable to pay that increased rent per beegah. By allowing two-thirds of the profit on all the land to the zemindar, we affirm the Deputy Collector's finding that no drawback is to be allowed for the remaining description of land other than the paddy land which, he has found, alone admits of a drawback; the rent in future payable by the plaintiff will be increased in the above proportion of two-thirds on all the land, taking the profits on the different species of land to be conclusively found to amount to the sums set forth in the different memos. attached to the Deputy Collector's finding. The plaintiff will pay all costs.

The 31st May 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Suit for pottah—Evidence.

Case No. 2438 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Sarun, dated the 16th May 1863, reversing a decision of the Deputy Collector of that District, dated the 28th November 1862.

Nundee Dass and others (Plaintiffs) *Appellants,*

versus

Shah Baboo Tewaree Lall and others (Defendants) *Respondents.*

Baboo Gopeenath Mookerjee for Appellants.

Baboo Kalee Kissen Sein for Respondents.

In a suit for a pottah, the ryot must prove that he holds the land in respect of which he seeks a pottah.

Steer, J.—THE plaintiff, alleging that he was the ryot of a certain piece of land, sued the defendants for a pottah. The Court of Appeal below has found, as a fact, that the plaintiff has given no reliable evidence that he ever cultivated the lands, and it accordingly rules that he is not entitled to a pottah.

It is urged in special appeal that proof that the plaintiff cultivated the lands is not necessary to entitle him to a pottah. But this is a mere idle objection. What the Judge means is that the plaintiff has failed to show that the lands for which he seeks a pottah, form any holding to which he as ryot has any title. Proof that he held the lands for which he applies for a pottah being certainly necessary, and such proof not having been given to the satisfaction of the Lower Court, there is no ground for disturbing the judgment. The special appeal is accordingly dismissed with costs.

The 31st May 1864.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Section 17 Act X of 1859—Enhancement—Rights of occupancy.

Case No. 1112 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Nuddea, dated the 26th January 1863, modifying a decision of Mr. H. S. Thompson, Judge of the Small Cause Court of Bowgong, with powers of a Deputy Collector, dated the 26th August 1862.

Noor Mahomed Mundul (Defendant) *Appellant,*

versus

Hurriprosonno Roy (Plaintiff) *Respondent.*

Baboo Anund Chunder Ghosal for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

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Section 17 Act X of 1859 does not say that in every case the rate of rent may be raised to the prevailing rate, but only that the rent shall not be raised except on some one of the grounds specified. That Section must always be read with reference to the general provision of Section 5 that the rent of a ryot having a right of occupancy shall not be more than is fair and equitable; and in considering what is fair and equitable, the ryot should not be called upon to pay to the landlord, under the name of rent, what is in fact not rent, but the produce of his own labor and capital sunk in the land.

Campbell, J.—THIS was a suit by a putneedar for enhanced rent on several grounds, but eventually the case turned on one ground, *viz.* that the rent previously paid was below the rate payable by ryots of the same class for similar land in places adjacent. The ryot pleaded a mokururee pottah, and a denial of the prevailing rates alleged by plaintiff.

The Judge of the Court of first instance decided that there was no mokururee pottah. With respect to the prevailing rate, he made much careful local inquiry. He found certain rates to have been settled as the result of suits regarding neighbouring land of a similar quality, and adopted those rates. But inasmuch as his local enquiry had shown that "the land was originally jungleboore and was brought into cultivation by the ryot at great labor and expense," he considered that part of the productiveness was due to the labor and capital of the ryot so sunk, and on that account he deducted one-third from the rates payable by ordinary ryots.

In appeal the Special Commissioner thought that the first Court had rightly found the prevailing rates, but he disallowed the deduction of one-third, saying no more than "there is no ground whatever for deducting one-third."

In special appeal appellant urges that the first Appellate Court has come to no finding on the alleged mokururee pottah; that the rates found are not those of immediately adjacent and similar lands, but those of other villages on the other side of a river; and that the deduction of one-third is fair and equitable.

We do not find that the mokururee pottah was urged in the first appeal, and therefore no finding was necessary.

Although the lands on which the prevailing rates were found are in other villages than the defendant's (the evidence regarding the lands immediately adjacent was very conflicting, and rejected as worthless), it seems to us that the Special Commissioner has found as a fact that these rates were paid "*by other ryots with rights of occupancy in the immediate neighbourhood*;" and looking also to the careful and exhaustive enquiry by the first Court on this point, we cannot doubt that so far the requirements of the law are sufficiently met.

But, in altogether rejecting the ground of abatement in the particular case on account of the labor and capital sunk by the ryot, we are clearly of opinion that the Special Commissioner was wrong.

It may well be doubted whether a ryot, who has taken a jungleboore lease, and at his own expense has cleared the land, can be considered to be a ryot "of the same class" as a ryot who has incurred no such expense within the meaning of Section 17. But independently of the question of class, it is most essential to observe that Section 17 does not say that in every case the rate of rent may be raised to the prevailing rate, but only that the rent shall not be raised except on some one of the grounds specified. There may be cases in which the rent is not equal to the prevailing rate, and in which there are still special reasons why it should not be raised. In fact, Section 17 must always be read with reference to the general provision of Section 5, that the rent of a ryot having right of occupancy shall not be more than is fair and equitable. And in considering what is fair and equitable, no consideration demands greater attention than this, that the ryot shall not be called on to pay to the landlord, under the name of rent, what is in fact not rent but the produce of his own labor and capital sunk in the land. That principle is expressly recognized in one of the Clauses of Section 17, and must, we think, under the general provisions of the Act and of the ordinary law of the country, be applied to all cases of occupancy ryots. As Mr. Justice Shumboonath Pundit has observed in a late paper, "when fair and reasonable rates are to be fixed by a Court of Justice, any increase in value created by the agency or at the expense of the ryot must, as a matter of course, be taken into consideration."

We think that the Special Commissioner has overlooked this principle. We therefore remand the case, in order that the first Appellate Court may decide whether the facts are as found by the first Court, *i. e.* whether in truth the land was reclaimed and rendered productive by the labor and at the expense of the ryot, and, if so, whether one-third of the rates paid by other ryots fairly represents the increased value due to the agency and expenditure of the ryot. If so, the decision of the Court of first instance should be affirmed. The costs will follow the result.

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The 1st June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Distraint of Crops.

Case No. 2822 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. Hope, Officiating Judge of Hooghly, dated the 8th July 1863, modifying a decision of Moulvie Hamidool Huq, Deputy Collector of Amptah, dated the 22nd April 1863.

Mohinee Dossee and others (Defendants) *Appellants,*

versus

Ram Coomar Kurmokar (Plaintiff) *Respondent.*

Baboo Otool Chunder Mookerjee for Appellants.

Baboo Mohendro Loll Shome for Respondent.

A landlord cannot distrain crops for arrears due, not from the tenant, but from another person not in possession and who did not cultivate the crops.

Loch, J.—Plaintiff in this case, who is a tenant, sued for confirmation of possession and damages for illegal distraint of crops. The defendant answered that the lands had been in the possession of the plaintiff; that he gave them up; and that defendant settled with another ryot to whom he gave possession, and he had distrained the crops on account of the arrear due by his new tenant.

It was proved that plaintiff never gave up the lands; that he cultivated the crops which had been distrained, and the first Court gave a decree confirming his possession and damages for the illegal distraint. This order, as regards damages, was confirmed by the Appellate Court; but so much of the decree as was confirmatory of possession was anulled on the ground that under Act X of 1859 a tenant in possession could not sue for a declaration of possession.

The defendant, zemindar, in special appeal urges that, as an arrear of rent for this land was due, he was entitled to distrain. Had the arrear been due from plaintiff, the tenant in possession, he would undoubtedly have had a right to distrain, but certainly not for an arrear alleged by him to be due from another party not in possession of the land, and who did not cultivate the crop, and whom he chose to set up to suit his own purposes. We see no ground for interfering with the decision of the Lower Court, and dismiss the appeal with costs.

The 2nd June 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble F. B. Kemp, *Judge.*

Right of occupancy—Farming lease.

Case No. 2177 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. Rivers Thompson, Officiating Judge of Nuddea, dated the 5th May 1863, affirming a decision of the Deputy Collector of that District, dated the 14th February 1863.

Mr. D M Gilmore (Plaintiff) *Appellant,*

versus

Sreemunt Bhoomick and others (Defendants) *Respondents.*

Baboo Aushotosh Dhur for Appellant.

Moulvie Murhumut Hossein for Respondents.

A right of occupancy under Section 6 Act X of 1859 cannot be acquired by holding under a farming lease which has expired.

Norman, C. J.—Mr. Gilmore appears to have held under a farming lease, which has expired, from 1262 to 1267. He acquires no title under Section 6 of Act X of 1859 by holding under such lease. On the contrary, one of the implied terms of such a holding would seem to be that, at the expiration of the time, the tenancy should come to an end and quiet possession of the land be restored to the landowner.

There is no ground for the appeal, which is dismissed with costs and interest.

The 7th June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Right of occupancy—Sub-tenant.

Case No. 2605 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 17th June 1863, reversing a decision passed by the Deputy Collector of that District, dated the 27th April 1863.

Jummeeuttunnissa Bebee and others (Defendants) *Appellants,*

versus

Noor Mahomed (Plaintiff) *Respondent.*

Baboo Romesh Chunder Mitter for Appellants.

No one for Respondent.

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A right of occupancy under Section 6 Act X of 1859 cannot be acquired by a ryot holding over for more than 12 years after the expiration of a lease for a term under a ryot having a right of occupancy.

Levinge, J.—THIS was a suit under Act X of 1859 by the plaintiff, ryot, alleging a right of occupancy and a dispossession of the zemindar who was a purchaser at an auction sale for arrears of revenue. The plaintiff complained of the defendant granting a pottah of his holding to another person in derogation of his right of occupancy; and the question to decide in the suit is, Has the plaintiff, under the acts proved in this case, a right of occupancy?

It has been found as a matter of fact that the plaintiff occupied the land under a pottah dated 1258 for four years certain as a ryot under a *ryot having a right of occupancy*, and from the year 1261 under a pottah granted by the izaradars of the former zemindar, and which pottah has not yet expired. The first Court held that these facts and such an occupancy gave no right to the plaintiff to maintain his suit. The second Court reversed that decision on the ground that, as the plaintiff showed an actual occupancy for more than 12 years, this gave him a right unless displaced by his zemindar, which the Court considered the zemindar failed to do.

On special appeal it is contended that the ryot can have no right of occupancy under Section 6 of Act X of 1859 on the above admitted state of facts, and we are of the same opinion. During the years 1258 to 1261, it is clear the 12 years' occupancy does not begin to run, inasmuch as it is expressly provided that the 12 years' rule shall not apply to the case of lands sub-let for a term by a ryot having a right of occupancy. Therefore the plaintiff has no *locus standi* inasmuch as from 1261 down to date of suit 12 years have not elapsed.

We say nothing as to the argument made for the defendant regarding the invalidity of the holding under the pottah granted by the izaradars of the former zemindars which, it is said, is not binding on the present defendant, the purchaser at the sale for arrears of Government revenue, as the plaintiff has put his right to maintain his suit on the right of occupancy for 12 years, and that is the only point to decide.

Appeal allowed and suit dismissed with costs.

The 7th June 1864.

Present:

The Hon'ble W. Morgan and Shumboonauth Pundit, *Judges.*

Jurisdiction—Suit for rent of a Hat.

Case No. 2969 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. R. Cockerell, Officiating Additional Judge of Nuddea, dated the 29th August 1863, affirming a decision of Baboo Doorga Persaud Ghose, Deputy Collector of Santipore, dated the 13th December 1862.

Gaetree Dabea (Plaintiff) *Appellant,*

versus

Thakoor Doss and others (Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Poornoo Chunder Mookerjee for Respondents.

A suit for arrears of rent of a hât is cognizable by the Collector under Clause 4 Section 23 Act X of 1859.

Morgan, J.—WE think the decision of the Lower Appellate Court wrong. The plaintiff is the owner of a portion of a hât and was entitled, in respect of his ownership of the land and whatever was on it, to receive the dues and collections made from persons resorting there. He let the hât to the defendant for a monthly rent, and the present suit is brought under Section 23 Act X of 1859, to recover arrears of rent due to him. In our opinion the suit is one within the jurisdiction of the Collector under the 4th Clause of that Section. It is a suit brought for the arrears of rent due on account of the land—the land that is, where the hât, which is the subject of the lease, is established. The defendant relied upon this defence; that he was in the service of the landowner and was entitled to receive for his service a certain monthly payment; and that that debt due to him had been written off against the sum due from him on account of rent. He stated in his written statement that the books of the plaintiff, if produced, would establish this. That in effect was a plea of payment, and, if established, was a sufficient answer to

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the suit. The Judge having dismissed the suit without trial on the ground of jurisdiction, and having erroneously dismissed it, we must remand the case to him for re-trial. He will take into consideration, among other things, the facts upon which the defendant relies to establish the payment or satisfaction of the sum claimed from him as rent. He will also consider, with reference to the provisions of Section 32, whether the suit is brought for the recovery of any arrears of older date than 3 years as therein provided.

The 7th June 1864.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Jurisdiction — Clause 6 Section 23 Act X of 1859—Ejectment—Confirmation of possession.

Case No. 2916 of 1863.

Special Appeal from a decision passed by Baboo Hurro Chunder Chatterjee, Principal Sudder Ameen of West Burdwan, dated the 3rd August 1863, *affirming a decision of Baboo Kalee Churn Chatterjee, Moonsiff of Kotulpore, dated the* 31*st July* 1862.

Gooroo Churn Coomar and another (Plaintiffs) *Appellants,*

versus

Khetter Mohun Roy and others (Defendants) *Respondents.*

Baboo Mohendro Lal Shome for Appellants.

Baboo Roopnath Banerjee for Respondents.

Clause 6 Section 23 Act X of 1859 (which restricts to the Collector's Court all suits to recover the occupancy of land from which a ryot has been dispossessed by the person entitled to receive rent for the same) is applicable equally to cases in which the tenant words his suit as for confirmation of possession, and brings the suit against the person entitled to receive rents in order to settle the question of right to possession.

Campbell, J.—This is a suit by a tenant claiming possession of land under a ryottee pottah. He has made the zemindar a defendant, and the zemindar has denied his right. In a former suit under Act X, plaintiff tried to set aside an attachment and distraint, and he lost that suit the Collector considering the pottah under which he claimed to be fabricated. Plaintiff is not an independent person claiming a right to receive rent, but a person acknowledging an obligation to pay rent under a pottah, and, therefore, he is not a party to whom the right to sue in the Civil Court is given by Section 140 of Act X. Practically, the truth seems to be that he has been dispossessed by the decision against him in the distraint case, and seeks to recover possession. But whether that be so or not, we are of opinion that the provisions of Section 23 Clause 6, which restricts to the Collector's Court all suits to recover the occupancy of land from which a ryot has been dispossessed by the person entitled to receive rent for the same, must be considered to apply equally to cases in which the tenant words his suit as for confirmation of possession, and brings the suit against the persons entitled to receive rent, in order to settle the question of right to possession. We think that, quite independent of the pre-adjudication regarding the genuineness of the pottah, this was a suit not cognizable in the Civil Court, and we dismiss the appeal with costs.

The 7th June 1864.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Sub-division of jote—Recognition by zemindar—Liability of Sub-lessee.

Case No. 2973 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 11*th August* 1863, *reversing a decision of the Assistant Collector of that District, dated the* 16*th March* 1863.

Shunkur Sahoy (Defendant) *Appellant,*

versus

Puddart Panday (Plaintiff) *Respondent.*

Baboo Nil Madhub Sein for Appellant.

Baboos Mohesh Chunder Chowdhry and *Kalee Mohun Doss* for Respondent.

A zemindar is not bound to recognize the sub-division of a jote. The purchaser of part of the jote is jointly liable, with the other holders, for the rent of the whole jote.

Campbell, J.—Special appellant bought part of a jote without obtaining the consent of the zemindar, and cultivated his own portion of the jote. The zemindar sued him, jointly with the other holders, for the rent of the whole jote. He seeks to establish his separate liability. But the law clearly provides that the zemindar is not bound to recognise the sub-division of the rent of a

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jote. Has then appellant rendered himself liable to the zemindar? We think that, by use and occupation of the zemindar's land, he has rendered himself liable, and that, as the zemindar is not bound to recognise the sub-division, if liable at all he must be jointly liable for the whole. In this view the Judge's mistake regarding the deed of sale is immaterial, and the appeal is dismissed with costs.

The 9th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover,

Judges.

Jurisdiction — Ejectment — Suit for possession.

Case No. 2892 of 1863.

Special Appeal from a decision passed by Baboo Gungachurn Shome, Principal Sudder Ameen of Dacca, dated the 4th July 1863, *reversing a decision passed by the Moonsiff of that District, dated the 30th January* 1863.

Shib Pershad Chuckerbutty (Plaintiff) *Appellant,*

versus

Muddun Mohun Chuckerbutty and others (Defendants) *Respondents.*

Baboo Prosunno Coomar Sein for Appellant.

Baboo Romanath Bose for Respondents.

Suit by a landholder to recover possession of land from which he has been ousted by his tenant, who, after having executed kubooleuts and paid him rents for a series of years, ceased to pay and so evicted him. Plaintiff omitted to sue defendant for rent on the kubooleuts when the defendant abstained from payment of rent and first set up an adverse title to him; and as he now looked upon the defendant as a trespasser,—HELD that his suit to recover possession was rightly brought in the Civil Court.

Loch, J.—IN this case the plaintiff sues to recover possession of certain land from which he has been ousted by his tenant, who, as he alleges, after having executed kubooleuts and paid him rent for a series of years, has, since 1266, ceased to pay and so evicted him. The defendant denies the plaintiff's title, and alleges that the land in question forms part of a different estate.

The first Court gave plaintiff a decree with mesne profits. In appeal, the Principal Sudder Ameen threw out the case, stating that, as plaintiff admitted the defendant to be his under-tenant and to hold by a pottah under him, and alleges that he was ousted by defendant and prays for recovery of possession, this suit is cognizable under Act X of 1859, and not in the Civil Court.

It is contended, in appeal, that this case has been rightly brought in the Civil Court; that the present action could not have been brought either under Clause 5, Section 23, or Section 25 of Act X of 1859, because, in the first place, plaintiff is not in possession, which is the position of the landholder when he has to bring an action under either of those Sections; and, secondly, the tenant has a prescriptive right of occupancy, and, therefore, plaintiff could not come under Section 25, and defendant has set up an adverse title.

On the other hand, it is said that plaintiff, when his tenant refused to pay rent, might have gone before the Collector and applied for the ejectment of the tenant, or, on proving his kobooleut, might have recovered the rent due if such was his object; that, in determining a question of the jurisdiction of a Court, reference should not be made to the answer filed by a defendant, but to the terms of the plaint, and in this case the plaint clearly showed that the suit was one cognizable only by the Collector under Act X of 1859, and was rightly thrown out by the Principal Sudder Ameen.

We think that the suit has been rightly brought in the Civil Court. It is true that the plaintiff might have brought a suit to recover rent on the kubooleuts alleged to have been executed by the defendant, when the defendant abstained from the payment of rent and first set up an adverse title to the plaintiff. Why he did not then do so, it is impossible to say. He now looks upon the defendant as a trespasser, and seeks to recover possession from him and produces his kubooleuts as evidence in support of his title to the land. Under this view of the case, we see no sufficient ground for throwing out the suit, and remand it to the Principal Sudder Ameen for disposal on the merits.

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The 10th June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Jurisdiction—Transferable tenures.

Case No. 1830 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. C. Fowle, Officiating Judge of Rungpore, dated the 27th March 1863, *reversing a decision of Baboo Mudden Mohun Dutt, Deputy Collector of Bhowaneegunge, dated the 25th February* 1862.

Degumburee Debea and another (Plaintiffs) *Appellants,*

versus

Shamasoonduree Debea and others (Defendants) *Respondents.*

Baboo Buggobutty Churn Ghose for Appellants.

Baboos Dwarkanath Bannerjee and *Anund Chunder Ghosal* for Respondents.

Semble.—The Collector has jurisdiction in a case where the zemindar opposes the entry of the purchaser of a transferable ryot's tenure.

Campbell, J.—This is a suit under Act X of 1859, Section 23, Clause 6, for recovery of possession of a jote in the Rungpore District. The jote in dispute appears to have been held at a variable jumma or at pergunnah rates, and was purchased by plaintiff.

The Deputy Collector found that plaintiff's vendors were in possession of the jote, defendants having themselves sued and taken rent from the said vendors; that, according to the custom of that part of the country, such jotes are transferable properties; that defendants have acknowledged them to be such, having frequently realized balances by sale of such jotes through the Court in execution of decrees; that plaintiff duly purchased and was ready to pay defendants a nuzzur or fine on entry, according to custom, and to conclude a settlement at pergunnah rates; but that defendants improperly and illegally refused to settle with or admit plaintiff; and thereupon he passed a decree in plaintiff's favor.

In appeal the Judge held that, as it was not proved that plaintiff himself, as distinguished from his vendor, held possession and paid rent, he has no case under Act X, and must go to the Civil Court. He therefore reversed the decree and dismissed the suit.

Special Appellant urges that the Revenue Court had jurisdiction, and that the Judge should have tried the case on the merits, *i. e.*, enquired whether plaintiff's vendors had right and possession and duly transferred their rights to plaintiff, or whether, as alleged by defendants, the alleged vendors had neither right nor possession. Defendant's pleader speaks as if the jote were of the nature of a holding intermediate between the zemindar and the actual cultivator, and refers us to Section 27; but if that Section applied, it would be altogether against him, since, in regard to such intermediate tenures, it distinctly gives to the Collector the jurisdiction in such cases when the zemindar refuses registry. Arguing from analogy, we should suppose that the Collector would also have jurisdiction when the zemindar opposes the entry of the purchaser of a transferable ryot's tenure. It may be that in the case of an intermediate holding where the right is a right to collect rents and not a tangible physical possession, and where registry is necessary to the exercise of the right and in fact to possession, a special provision was necessary for enforcing the right to registry; but that, in the case of a ryot's jote, the holder who has actual possession of the soil, having the power of transferring such possession (with or without right) to another, or the question of such mokurruree jotes not having occurred to the Legislature, special provision was not necessary. The vendor and vendee must, we think, be considered to be so far for the purposes of the law one person, and the zemindar who has forcibly prevented the entry of the vendee and taken the land, must be held to have dispossessed him just as much as if he had done so after the latter had peaceably obtained possession. We therefore decree the appeal, and remand the case to the Lower Appellate Court to try on the merits whether plaintiff's vendor had right and possession, and whether plaintiff duly acquired that right. If so, plaintiff is entitled to a decree for possession.

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The 10th June 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Case No. 1883 of 1863.

Res judicata—Rent—Damages.

Special Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 6th April 1863, *reversing a decision of the Sudder Ameen of that District, dated the* 23*rd September* 1862.

Gopal Kisto Mookerjee (Plaintiff) *Appellant,*

versus

Mudhoosoodun Paul Chowdhry (Defendant) *Respondent.*

Baboo Sreenath Sein for Appellant.

Baboo Mohendro Lall Shome for Respondent.

Where a suit for rent due on a certain stipulation in a putnee lease was dismissed in the Revenue Courts,—HELD that another suit could not be brought in the Civil Court as for damages laid at the amount of rent which would have been realized.

Campbell, J.—SPECIAL appellant brought a suit in the Revenue Courts for rents due on a certain stipulation in a putnee lease, and on appeal the suit was dismissed. He now brings another suit in the Civil Court laying it as for damages and measuring the damages by the amount of rents which he ought to have realised. We think that the question is one of rent cognizable in the Revenue Courts only, and the cause of action is really the same. We, therefore, dismiss the special appeal with costs.

The 20th June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Tenancy (Holding and cultivating)—Tender of Pottah—Suit for determination of rent and a kubooleut thereupon.

Case No. 3358 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. A. Elpinstone-Dalrymple, Additional Judge of Chittagong, dated the 7th September 1863, *reversing a decision of Baboo Gour Chunder Roy, Deputy Collector of that District, dated the 16th June* 1862.

Nityanund Ghose (Defendant) *Appellant,*

versus

Kissen Kishore (Plaintiff) *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Hem Chunder Banerjee and *Kissen Succa Mookerjee* for Respondent.

Where *A* avowedly holds and cultivates *B*'s land, *A* is, by the universal custom of this country, *B*'s tenant (even without express permission to cultivate on *B*'s part, or express condition to pay rent on *A*'s part), and, while so holding and cultivating, is bound to pay *B* a fair rent and to give him a kubooleut.

Proof of tender by landlord, and of refusal by tenant, of a pottah, is not necessary or practicable in a suit for determination of rent and a kubooleut thereupon.

Steer, J.—THIS is a suit for the purpose of settling what the defendant's rents ought to be at the pergunnah rate, and to obtain from him a kubooleut under those rates.

The plaintiff states that he has ascertained that the defendant holds and cultivates lands within his zemindaree, for which he pays no rent.

The defendant denied that he cultivated any land belonging to the plaintiff, or ever paid him any rent. He pleaded that the lands referred to in the plaint had been given many years ago by the plaintiff's ancestor to the defendant's ancestor, in exchange for some other land. He claimed, then, to hold the lands adversely to the plaintiff, and, the relation of landlord and tenant not existing, he pleaded that the suit did not lie under Act X of 1859.

It has been found as a fact by the Lower Court, that the exchange of lands pleaded by the defendant is a false allegation, and that the lands for which a kubooleut is sued for are part and parcel of the zemindaree lands of the plaintiff.

The lands, then, being lands of which the plaintiff is the proprietor, and the defendant never having paid rent for the same, or acknowledged the zemindar's right to treat him as a tenant, do the parties stand in the relation of landlord and tenant?

The defendant holds and cultivates the plaintiff's lands, and had the present suit been one for rent during the occupancy, there is little doubt the defendant would be deemed to be a tenant and be adjudged liable to payment of rent; for it is an acknowledged principle that every zemindar has an inherent right to the rent of any and all lands held and cultivated within his zemindaree. In the same way, is he not entitled to receive from the person who holds and cultivates any land within his zemindaree a kubooleut?

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We think that, though by the law of landlord and tenant, as applied in England, a person who takes and cultivates the lands of another (there being no express permission to cultivate on the side of the landlord, nor any express condition to pay rent on the part of the cultivator) would not be allowed to be regarded as a tenant, but treated as a mere trespasser, the peculiar circumstances of this country preclude the applicability of the technical doctrine of the English Law of landlord and tenant to such a case. Here it is a very usual thing for a man to squat on a piece of land, or to take into cultivation an unoccupied or waste piece of land Tenancy, in a great many districts in Bengal, commences in this way, and where it does so commence, it is presumed that the cultivator cultivates by the permission of the landlord, and is under obligation to his landlord to pay him a fair rent, when the latter may choose to demand it. Thus, the established usage of the country regards these parties as landlord and tenant, and unless the landlord chooses thus to treat him, the cultivator is not regarded, as he would be by the law as administered in England, as a trespasser, but as a tenant, and he would be so although he may never have expressly acknowledged the landlord's right, or entered into any express contract with him for the payment of rent. If he chooses to cultivate the zemindar's lands and the zemindar lets him, there is an implied contract between them, creating a relationship of landlord and tenant.

Therefore, we think that, under the circumstances of the case where the defendant avowedly holds and cultivates the plaintiff's lands, he is, by the universal custom of the country, the plaintiff's tenant, and, while so holding and cultivating, is bound to pay him a fair rent and to give him a kubooleut.

It is argued that the present suit for a kubooleut will not lie, inasmuch as there has been no tender of a pottah. In answer to this, we would observe that, in a suit simply for a kubooleut, it would be necessary, no doubt, to show that the plaintiff had tendered a pottah to the defendant, and that he declined to take it. But the present suit is not one for a kubooleut only, but for determination of rent and a kubooleut thereupon. A suit will lie for the determination of rent, and when the rent is settled, and not till then, will the parties be in a position to exchange pottah and kubooleut. The defendant being a tenant not in a position to assert a right of occupancy, it was, no doubt, in the power of the plaintiff to make his own conditions with the defendant, both in regard to the duration of the pottah and the rate of rent. (*Vide* Sections 8 and 76). But he has waived whatever right he had to fix his own conditions, and has left it to the Court to do so under the provisions of Sections 31 and 76.

The rent is, therefore, the first thing to be ascertained, and for this purpose the suit must be remanded to the Lower Court. When the rent is ascertained, the plaintiff will be called upon to execute and to deliver a corresponding kubooleut. If the parties cannot agree as to the term of the pottah, it must be fixed at the shortest period possible, *viz.*, for one year, and the parties will have it in their power to determine or to continue the tenancy, as it may mutually suit them, by resort to the course laid down for that purpose in the Act.

The 22nd June 1864.

Present:

The Hon'ble F B. Kemp and A. G. Macpherson, *Judges.*

Ejectment—Appeal.

Case No. 2811 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. Beaufort, Judge of the 24-*Pergunnahs, dated the* 23*rd June* 1863, *declining to hear an appeal from a decision of the Deputy Collector of Baraset, dated the* 15*th February* 1862.

Kalleebur Opadyah (Plaintiff) *Appellant,*

versus

Aynoodeen Mundul and others (Defendants) *Respondents.*

Baboo Annund Chunder Ghosal for Appellant.

Baboo Romanath Bose for Respondents.

In a suit for ejectment, whether under Clause 5 Section 23 or under Section 78 Act X of 1859, an appeal lies to the Judge under Section 160.

Kemp, J.—The plaintiff in this case, the special appellant before us, sued to eject a ryot on account of non-payment of arrears of rent. His suit was cognizable by the Collector under the provisions of Clause 5 Section 23 Act X of 1859. In the plaint relief is sought under the provisions of Section 78 of the same Act; but we do not find that the plaintiff adduced any unexecuted

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decree for arrears of rent as evidence of the existence of such arrears. The Judge has held that the appeal lies to the Collector and not to his Court. We think that this finding is clearly wrong, for whether the suit of the plaintiff was instituted under the provisions of Clause 5 Section 23 or of Section 78 Act X of 1859, in both cases an appeal would lie to the Judge under the provisions of Section 160 of the Act.

Section 153 refers to suits under Clauses 2, 4, and 7 of Section 23 and under Section 24, and not to suits under Clause 5 of Section 23 and under Section 78.

This suit was tried, in the first instance, by a Deputy Collector; but if the Collector had tried it, his judgment would not have been final; an appeal therefore lies to the Judge. The suit is therefore remanded to the Judge for trial.

Costs to follow the result.

The 22nd June 1864.

Present:

The Hon'ble F. B. Kemp and A. G. Macpherson, *Judges.*

Jurisdiction.

Case No. 1640 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. E. G. Birch, Officiating Additional Judge of East Burdwan, dated the 20th February 1863, affirming a decision of Baboo Ram Narain Shamadar, Deputy Collector of that District, dated the 24th July 1862.

Nobo Coomar Bhuttacharjee (Plaintiff) *Appellant,*

versus

Mothoor Mohun Aitch and others (Defendants) *Respondents.*

Baboos Baneenath Bose and *Romanath Bose* for Appellant.

Baboo Mohendro Lall Shome for Respondents.

The finding of a Court cannot be questioned by a Court of concurrent jurisdiction.

Kemp, J.—We think that the decision of the Judge is clearly wrong. A Court of concurrent jurisdiction had found that the suit of the plaintiff was not barred, and had remanded it for trial on the merits. No appeal was preferred against this decision. The present Judge has again raised the issue in bar, and has decided that the suit is beyond time. In doing this he has exceeded his jurisdiction, and his decision must be reversed and the suit remanded for trial on the merits. Costs to follow the result.

The 22nd June 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Section 2 Act VI of 1862 B. C.—Damages.

Case No. 2675 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. O. W. Malet, Judge of Beerbhoom, dated the 23rd June 1863, modifying a decision of Baboo Radhanath Gangooly, Deputy Collector of that District, dated the 30th January 1863.

Bolye Chund Dutt (Plaintiff) *Appellant,*

versus

Punchanun Chobay (Defendant) *Respondent.*

Baboos Gopal Loll Mitter and *Anund Gopal Paulit* for Appellant.

No one for Respondent.

The award of damages for arrears of rent under Section 2 Act VI of 1862 B. C. is discretionary.

Jackson, J.—This was a suit for arrears of rent in which several receipts for rent were contested and finally decided by the Judge to be genuine receipts, in reversal of the decision of the Deputy Collector, who had held them to be false. In passing judgment, the Judge further reversed the decree of the Deputy Collector for damages on the arrears which were due under Section 2 Act VI of 1862 B. C.

In special appeal it is said that the Judge threw the *onus* of proof that the tenant has neglected or refused to pay his rent, on the plaintiff, landlord, whereas he should have looked to see what proofs the defendant, tenant, had given to show that he had offered the rent.

The Courts have to exercise a discretion in the awarding of damages under this law. It is not intended that they shall be awarded in every case of arrears, but only under special circumstances. No circumstances proving any special refusal or neglect were proved to the satisfaction of the Judge, and he was therefore right to reverse this part of the first Court's decision. We see no grounds for interference and dismiss this appeal.

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The 23rd June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Rent—Judgment by default.

Case No. 53 of 1863 under Act X of 1859.

Regular Appeal from a decision passed by Mr. N. Alexander, Deputy Collector of Purneah, dated the 6th January 1864.

Baboo Dhunput Singh (Plaintiff) *Appellant,*

versus

Karoo Loll Thakoor (Defendant) *Respondent.*

Mr. R. T. Allan and *Baboos Bungsee Budden Mitter* and *Romanath Bose* for Appellant.

Baboos Mohesh Chunder Chowdry and *Mohendro Loll Shome* for Respondent.

Suit laid at Rupees 5,546-14-6.

A judgment by default is not a satisfaction of the rent sued for.

Steer, J.—The plaintiff sues for arrears of rent of the Moolkee year 1270, the arrears with interest amounting to Rs. 5,546-14-6.

The defendant says he paid the entire rents of 1270 on various dates in 1270 and 1271, but that the plaintiff gave receipts for these payments as the rents of 1269.

The defendant does not say he paid the rents of 1269, but he rests his case on the fact that a prior suit, which the plaintiff brought for the rents of 1269, was dismissed for default. He seems to think this judgment by default was a satisfaction of the rent embraced in the dismissed suit, and therefore, if there was no arrears for 1269, the receipts which the plaintiff gave as for rents of 1269 must be sought to be carried to his credit for rents of 1270.

The Lower Court has taken the same view and has dismissed the plaintiff's suit.

We observe that four of the receipts for payment of rent made in 1270, and aggregating Rs. 5,971, were given during the time that the former suit was pending. It is very possible, therefore, that the plaintiff allowed that suit to go by default, because, by these payments, his claim for the rents of 1269 was satisfied. That they were satisfied by any other payments is not proved, nor is it even alleged they were. We hold, therefore, that the principle of the decision of the Lower Court is unsound; and looking to the absence of any affirmation by the defendant that he had discharged the rents of 1269, and the utter improbability that he would, while a suit for rent of 1269 was pending against him, have paid rent to the plaintiff and allowed him to credit them for 1269, for which there were no arrears, we are satisfied that there have been no rents paid for 1270, except those which the plaintiff admits; and we accordingly decree the arrears against the defendant, reversing the decision of the Lower Court, with all costs of suit.

The 23rd June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Mokururee Title.

Case No. 3218 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 6th August 1863, *reversing a decision of the Assistant Collector of that District, dated the 16th March* 1863.

Raj Roop Roy and others (Defendants) *Appellants,*

versus

Chowdhry Oogra Narain Sing (Plaintiff) *Respondent.*

Baboos Onookool Chunder Mookerjee and *Otool Chunder Mookerjee* for Appellants.

No one for Respondent.

A mokururee title, judicially established, cannot be disturbed by a decree for arrears of rent at different rates passed subsequently without reference to such title.

Loch, J.—In this case plaintiff sued to recover arrears of rent at the rate of Rs. 26 per annum, besides a moiety of certain crops grown by defendants.

The defendants admitted their occupancy, but pleaded a mokururee title at Rs. 12, and in support of that title filed two decisions, dated 11th January 1832 and 27th July 1850, by which their right to hold the lands at the above rate is established.

The first Court dismissed the plaintiff's claim, holding that the documents pleaded by defendants fully proved their title; but the Judge, on appeal, has reversed the order on the strength of a subsequent decision for arrears of rent, dated 20th September 1860, passed by the Collector under Act X of 1859, and because the defendants failed to produce their pottahs.

On referring to the decision of the Civil Court of 11th January 1832, which was a suit for rent between the representatives

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of the parties now before the Court, we find that the question of the defendant's right to hold the lands at a fixed rate of Rs. 12, was raised and ultimately decided in defendants' favor. The Deputy Collector's decision of the 27th July 1850 appears to have been passed with reference to the previous judgment, while the last decision of 20th September 1860, upon which the Judge relied, makes no mention of the defendants' title, nor does it refer to the previous decisions. Now, as it is evident that the defendants have held possession of the land in suit for a very long time at a fixed rate of Rs. 12 per annum, we think the decision of 20th September 1860 quite insufficient to disturb that right, or to set aside the previous decree of the 11th January 1832 in their favor. We therefore reverse the order of the Judge, and confirm the decision of the first Court with costs.

The 24th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Joinder—Suits for rent against several ryots.—Plea of multifarious.

Case No. 3228 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. J. W. Dalrymple, Judge of Bhaugulpore, dated the 9th July 1863, affirming a decision of Mr. W. H. Henderson, Collector of that District, dated the 25th March 1862.

Gunesh Persad and others (Plaintiffs) *Appellants,*

versus

Mr. W. Wilson and others (Defendants) *Respondents.*

Baboo Debendro Narain Bose for Appellants.

Mr. R. T. Allan and *Baboo Hem Chunder Banerjee* for Respondents.

The dismissal, by the Judge on appeal, of a suit for rent as multifarious because brought against some 40 tenants holding separately, was upheld in special appeal, notwithstanding the objection that the plea was not taken in the first Court.

Loch, J.—The plaintiff sued some 40 tenants holding 50 beegahs of land in one case for rent. The Judge, on appeal, finding that the tenants did not hold in common, but had separate holdings, dismissed the case as multifarious.

It is objected that this plea was not taken in the first Court.

Whether the plea was taken or not in the first Court, we are quite satisfied that the Judge was right in taking up so glaring a defect in the plaint, as it was quite impossible to pass any decree for rent as the case then stood.

Some of the parties admitted the plaintiffs' claim, and it is urged that a decree should have been passed against them. We think that the form in which the plaint was drawn up was altogether so defective that a decree could not be passed against any one of the defendants.

As we see no ground for interfering with the decision of the Lower Court, we dismiss the appeal with costs.

The 24th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Enhancement—Presumption of uniform payment from Permanent Settlement—Right of occupancy.

Case No. 3123 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. R. Cockerell, Officiating Additional Judge of Nuddea, dated the 30th July 1863, affirming a decision of Baboo Taruck-nath Mullick, Officiating Deputy Collector of that District, dated the 14th February 1863.

Ramnarain Singh and others (Defendants) *Appellants,*

versus

Horonath Roy and others (Plaintiffs) *Respondents.*

Baboos Mohinee Mohun Roy and *Anund Mohun Tagore* for Appellants.

Baboos Sreenath Doss and *Bungsee Dhur Sein* for Respondents.

Proof of uniform payment of rent for 20 years by ryots pleading possession from the Decennial Settlement will, unless rebutted by the landlord, entitle them to the presumption under Section 4 Act X of 1859, and save their holdings from enhancement. But proof of uniform payment by ryots pleading possession for 50 or 60 years, will entitle them to nothing but a right of occupancy.

Glover, J.—This is one of a number of cognate suits brought by a landlord against his tenants for recovery of enhanced rent after notice served.

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Both Lower Courts held that the rent could be enhanced, the Judge considering that the defendants had not been able to prove payment of a uniform rate of rent.

It is urged before us in special appeal—

1*st*.—That former decisions of the Civil Court have declared that the jumma of the land in suit is not liable to enhancement.

2*nd*.—That the Judge was wrong in stating that the dakhilas did not prove payment of an unvarying rate of rent.

3*rd*.—That payment of one rate of rent for 20 years entitled special appellants to the presumption that the land had always been held at that rate from the time of the Decennial Settlement.

We will consider the last two points first. On the question of "varying" rents, as shown by the dakhilas, we think that the Judge is wrong. We have gone carefully over the whole of these receipts, from the year 1248 to the year 1268 B. S., and find in all of them the same amount of rent, *viz* Rs. 4-4-4. In point of fact, this part of the special appellant's case is not contested; but we have thought it right to go into the question, as the Judge has mainly relied upon it in coming to a decision.

The real question is involved in the special appellant's third objection. It may at once be conceded that a ryot claiming to hold his land from the time of the Decennial Settlement, and proving an unvarying rate of payment of rent for the 20 years preceding the institution of suit, is, under Act X of 1859, entitled to the presumption that he has paid the same rate of rent from the year 1790 A. D., always supposing that the landlord has not been able to show positively that the rent paid has varied during the interim. If, therefore, the special appellants in this case had come into Court with the allegation that they had held their land from the time of the settlement, their proof of payment of the same rate of rent for 20 years would, in the absence of any rebutting testimony on the part of the special respondents, have been sufficient to secure their holdings from enhancement. But they did not come into Court on this plea. The record shows that when the case was instituted in the Moonsiff's Court, they sent in their gomashta to file a reply. This man was examined on behalf of his principals, and deposed that they had held the land for a very long time for 50 or 60 years; but he nowhere mentioned that it had been in their possession since the Permanent Settlement.

Some 6 months after, when the case was ready for hearing, special appellants, who appear to have found out their mistake, applied by petition to the Moonsiff to have their gomashta's statement amended. They stated in this that the land had been in their possession for three generations, and their Counsel before us wishes this to be taken as an amendment on their former statement, and as proof that they pleaded possession from the time of the settlement.

Now, in the first place, we do not consider that such a petition could, under the circumstances, have been received. When the case was first instituted, the special appellants, after due notice of what was wanted from them, sent in their gomashta to act on their behalf. The man was a regularly accredited agent, and from his position may reasonably be supposed to have known the real state of his principals' interests, as well as the principals themselves. No objection is taken to his deposition till 6 months afterwards, when, just as the case is ready for trial, special appellants step in, throw overboard their agent, declare him to be stupid and ignorant, and file a reply of their own

But even admitting, for the sake of argument, that the petition was receivable, we do not see that it mends the special appellants' case. The petition does not claim to hold the land from the date of the Permanent Settlement, but from some uncertain period for three generations,—a phrase susceptible of very wide interpretation, and certainly insufficient to support a claim to hold from and before a particular year.

The Civil Court's decisions alluded to by the special appellants in the first ground of objection, do not assist their case in any way. They were suits to set aside summary awards under Regulation III of 1799, and the utmost they prove is that in the years 1849 and 1850 the special appellants paid a uniform rate of rent—a fact we have already conceded in their favor.

If special appellants had pleaded possession from the Decennial Settlement—if they had held their tongues altogether—even their proof of unvarying payments of rent for 20 years would, in the absence of any proof on the part of the special respondents, have raised the presumption in their favor. But as they pleaded possession for 50 or 60 years only, they are not entitled by law to any privilege, even though they had proved payment of the same rate of rent for the entire period. They have nothing but the right of occupancy.

We therefore dismiss this appeal with costs.

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The 24th June 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Splitting—Section 7 Act VIII of 1859 (applicable to suits for rent).

Case No. 2713 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 22nd June 1863, modifying a decision passed by the Deputy Collector of Pubna, dated the 24th March 1863.

Ranee Bhabosoonderee (Plaintiff) *Appellant,*

versus

Bhugwan Chunder Muzoomdar (Defendant) *Respondent.*

Baboos Sreenath Doss and *Nil Madhub Sein* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

Section 7 Act VIII of 1859 (providing against an endless multiplicity of suits) is applicable to suits for rent under Act X of 1859.

Seton-Karr, J.—THE decision of the Judge, ruling that the arrears due for 1268 and for 3 months of 1269 should have been included in the former suit instituted before the Collector in 1269, appears to us to be sound and in conformity with the spirit of the law. Section 7 Act VIII of 1859 evidently was intended to discourage a needless multiplicity of suits, and to no class of suits could it be more fittingly applied than to suits for rent, which are intended to facilitate the realization of his rents by the zemindar, and not the harassment of the ryot by suits split or vexatiously repeated.

We confirm the decision of the Judge, and dismiss this appeal with costs.

The 27th June 1864.

Present:

The Hon'ble F. B. Kemp and A. T. T. Peterson, *Judges.*

Witnesses — Irregularity — Suit for rent — Nominal lessee — Benameedar.

Cases Nos. 2882 and 2883 of 1863 under Act X of 1859.

Special Appeals from decisions passed by Mr. A. W. Russell, Officiating Judge of Behar, dated the 18th August 1863, affirming decisions of Mr. J. S. Drummond, Collector of that District, dated the 10th June 1863.

Case No. 2882.

Sheikh Kamyab (Defendant) *Appellant,*

versus

Mussamut Omda Begum (Plaintiff) *Respondent.*

Case No. 2883.

Moulvie Abdool Wahab (Defendant) *Appellant,*

versus

Mussamut Omda Begum (Plaintiff) *Respondent.*

Messrs. C. Gregory and *J. Baptist* for Appellant.

Messrs. G. Gregory and *A. F. Lingham* and *Baboo Khetternath Bose* for Respondent.

Where a Collector discharged the defendant's witnesses without taking their depositions after keeping them in attendance for nearly a month, and afterwards verbally ordered the defendants to procure their attendance within 3 days, and, on their failure to appear, decided the case in their absence, the Collector's proceedings were set aside as irregular.

A landlord cannot hold both the nominal lessee and the beenameedar liable for rent, but must make his election.

Peterson, J.—THESE were actions brought by the plaintiff to recover rent. It appears on the proceedings that the defendant's witnesses had, after being kept in attendance for nearly a month before the Collector, been discharged by him without having had their depositions taken, and the defendants were afterwards verbally ordered to produce their witnesses within 3 days, and, on their failing to appear, the case was decided in the absence of the defendant's witnesses. The defendants below brought this to the attention of the Judge on appeal, and tendered their witnesses.

Under the circumstances, the Court thinks the proceedings of the Collector were irregular, and that the defendants should have had a longer opportunity to get their witnesses

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together. Witnesses who have been kept nearly a month from their homes, are not very easily induced to come again and run the chance of being kept another month away. The Court does not know why, if plaintiff was not ready on the appointed day, the cause was not struck off, or why the witnesses were kept so long in attendance. The case must be remanded, and necessary time given for defendants to get their witnesses together.

The Court below can go into the question as to whether the lease was benamee or not, but the plaintiff cannot have his remedy against both the nominal lessee and the benameedar. He must take his election. He cannot hold both liable to the rent. If he proves that the person in whose name the lease was taken was simply an agent for another, he can proceed against that other, unless he elects to sue the agent on his written contract, in which case he cannot go against the principal. The plaintiff must here elect, and the party whom she has unnecessarily made a defendant must have the suit dismissed as against him.

The 27th June 1864.

Present:

The Hon'ble Sumbhoonauth Pundit and E. P. Levinge, *Judges.*

Notice of Enhancement — Non-Service.

Case No. 3053 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. A. Swinton, Judge of Tipperah, dated the 11th August 1863, *affirming a decision of Baboo Govind Chunder Bose, Deputy Collector of that District, dated the 30th May* 1863.

Rajkissen Roy (Plaintiff) *Appellant,*

versus

Prankissen Roy and others (Defendants) *Respondents.*

Baboos Gopeenath Mookerjee and *Luckee Churn Bose* for Appellant.

Baboo Debendro Narain Bose for Respondents.

The service of a defective notice of enhancement (*i. e.* one not containing the reasons assigned in Section 13 or 17 Act X of 1859) is tantamount to non-service.

Levinge, J.—This is a special appeal preferred by the plaintiff, who sued to enhance the defendant's rent. The defendant pleaded that he had not been served with the necessary notice. This fact had been found by both the Lower Courts, as the notice served does not contain any of the reasons assigned in the 13th or 17th Section. It has been urged that the defendant objected only to the non-service of a notice, not that the notice was defective; but this ingenious distinction, taken on special appeal, will not avail the appellant, for the service of a thoroughly defective notice may be treated as if there had been no service of notice (*i. e.* a notice required by the Act).

The other objection taken is that the Lower Court should have decided on the right of the plaintiff to enhance. This the Court has done by, *first*, ruling on the defect of the notice; and, *secondly*, by holding, on the evidence adduced by the plaintiff, an utter failure to prove his right. Appeal dismissed with costs.

The 27th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Ejectment—Jurisdiction.

Case No. 2921 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 7th July 1863, *affirming a decision of the Moonsiff of that District, dated the 3rd December* 1862.

Mofuzzul Hossein and others (Defendants) *Appellants,*

versus

Tussooduk Ali Khan (Plaintiff) *Respondent.*

Baboos Debendro Narain Bose and *Poorno Chunder Mookerjee* for Appellants.

Baboo Tarucknath Sein for Respondent.

In a suit for ejectment between rival tenants, the jurisdiction of the Civil Court is not barred by reason of an allegation by the ousting tenants of their holding a lease from the zemindar, or even of ratification of their acts by the zemindar.

Loch, J.—We think that the Lower Courts have taken a correct view of this case. Plaintiff alleges that he was ousted by the defendants who are not entitled to receive rent from him. Defendants allege that they have received a pottah from the zemindar after plaintiff relinquished the lands. The zemindar has taken no direct or active steps, either personally or by his servants, in the ejectment. The ousted tenant is not obliged to inquire into the truth of the allegation advanced by the defendants. Whether they have secured a pottah from the zemindar or not, is no matter to him. He

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knows that they are not entitled to receive rent from him, and therefore they are trespassers, and, as such, he brings his action against them in the Civil Court. The defendants' allegation that they hold a lease from the zemindar, and even a subsequent ratification of their acts by the zemindar, cannot oust the jurisdiction of the Civil Court, and oblige the complainant to bring his action under the provisions of Act X of 1859. Under this view of the case, we dismiss the special appeal with costs.

The 27th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Ejectment—Jurisdiction.

Case No. 2846 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. Hope, Officiating Judge of Hooghly, dated the 15th June 1863, reversing a decision of Mr. A. Davidson, Second Principal Sudder Ameen of that District, dated the 4th September 1862.

Joy Kissen Mookerjee (Defendant) *Appellant,*

versus

Modoosoodun Kulleah (Plaintiff) *Respondent.*

Baboos Mohendro Loll Shome and *Mutty Loll Shome* for Appellant.

Baboo Nil Madhub Sein for Respondent

To bring a case of ejectment within the jurisdiction of the Collector's Court under Clause 6 Section 23 Act X of 1859, there must be some direct act on the part of the person entitled to receive the rent, either by ejecting the tenants personally, or by his servants, or by joining with those who actually do so.

Loch, J.—In this case plaintiff sued to recover possession, alleging that certain parties had illegally ejected him from the land, and he made the zemindar a *pro formâ* defendant.

The defendants stated that plaintiff had abandoned the land, and that they had taken possession under a pottah from the zemindar.

The zemindar, Joy Kissen Mookerjee, pleaded that the suit should have been brought in the Collector's Court under Act X of 1859, as it was the act of the zemindar by which plaintiff was ousted; but that plaintiff's suit in that Court was barred by lapse of time.

The Lower Appellate Court held that the defendants had ousted the plaintiff; that any subsequent ratification of their acts by the zemindar could not take the case out of the jurisdiction of the Civil Court; and, therefore, the Judge gave a decree for possession with mesne profits and costs, making the zemindar jointly liable for the same.

In special appeal the question of jurisdiction is first urged, and a decision of this Court of 10th February 1864 is quoted in support of the view now taken by the zemindar, special appellant, who pleads that, as he was the party who really ousted the plaintiff, the suit was cognizable only by the Collector under Act X of 1859.

The object of the zemindar, Joy Kissen Mookerjee, in this case, is self-apparent. The period for bringing a suit in the Collector's Court has lapsed, and therefore he comes forward alleging that the ejectment was made under his orders, and that he alone is responsible, and he hopes to stifle all investigation by raising the objection that, as the ejectment was the act of the zemindar, plaintiff was bound to seek redress in the Collector's Court.

We think, however, that in cases of ejectment, the tenant seeking to recover possession is bound to bring his suit under Clause 6 Section 23 Act X of 1859, only where the ejectment has been the direct act of the zemindar entitled to receive the rent or of his servants acting under his orders; that where third parties, with whom the tenant has no privity, eject him on the allegation of holding a lease from the zemindar, such allegation, or even the fact of their holding such a lease, is not a sufficient reason for making the tenants subject to the jurisdiction of the Collector's Court, because the ejectors, as in this case, are not entitled to receive the rents, and the plaintiff is not bound by their allegations; nor would any subsequent ratification of their acts by the zemindar alter the jurisdiction and oblige the tenant to bring his suit in the Collector's Court. To bring a case of ejectment within the jurisdiction of the Collector's Court under the provisions of the above Clause and Section, we think there must be some direct act on the part of the person entitled to receive the rent, either by ejecting the tenants personally or by his servants or by joining with those who actually do so. We therefore affirm this part of the decision of the Lower Appellate Court; but as the Judge finds that the zemindar was not the party who ejected the tenant, we think that he cannot be made responsible for the mesne profits or costs of the plaintiff. We therefore reverse this part of the order of the Lowre Court, and decree so much of this appeal with costs.

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The 27th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Section 105 Act X of 1859—Ejectment — Sale of under-tenure in execution of decree — Notice to zemindar (under Section 17).

Case No. 3043 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 6th August 1863, *reversing a decision of the Moonsiff of that District, dated the 28th April* 1863.

Maharaja Sutteeschunder Roy Bahadoor, (Defendant) *Appellant,*

versus

Modhoosoodun Paul Chowdhry (Plaintiff) *Respondent.*

Baboo Roopnath Banerjee for Appellant.

Baboo Mohendro Lall Shome for Respondent.

Under Section 105 Act X of 1859, an under-tenure may be sold in execution of decree, provided there be an arrear of rent adjudged.

The purchaser of the rights and interests of a cultivator is not bound, under Section 27 Act X of 1859, to notify his purchase to the zemindar.

A zemindar who has purchased his ryot's rights and interests in the land after their sale for valuable consideration to another party, cannot oust the *bonâ fide* purchaser.

Glover, J.—The special respondent in this case (plaintiff in the Court below) sues to recover possession of a certain plot of garden land (that is, land planted with trees) situate within the estate of the special appellant. It appears from the record that special respondent brought a suit against the actual occupying ryots of the land in question and got a decree, in execution of which he purchased all their rights and interests in the garden aforesaid. Some time afterwards, the zemindar gained a suit against the same ryots for arrears of rent due on the garden for a period of 8 years, and, in execution of the decree, himself bought the rights and interests of his tenants, thereby ousting the special respondent

The Principal Sudder Ameen held that the tenure was not one that could be sold for arrears of rent under Section 105 of Act X of 1859, and that, as the special respondent had already purchased the rights of the occupying ryots before the special appellant had obtained a decree against them, the latter, in purchasing the tenants' rights under that decree, bought that which did not exist. He decreed special respondent's claim accordingly.

It is urged in special appeal—

1*st.*—That the Principal Sudder Ameen was wrong in deciding that the tenure was one not liable to sale for arrears of rent.

2*nd.*—That as the special respondent did not give notice to the zemindar of his purchase, the auction sale for arrears of rent, though posterior in time, cannot be set aside.

3*rd.*—That a zemindar has power to oust a tenant for default, and as the special appellant's proceedings under the decree come to the same thing, they cannot be interfered with.

The *first* objection, although it does not touch the point at issue in this case, inasmuch as the tenure was not sold but only the rights and interests of the tenants, may, we think, at once be conceded. The tenure in question is admitted to be a transferable one; and, under Section 105 of Act X of 1859, such a tenure may be brought to sale in execution of decree for arrears of rent. The only thing necessary is that there should be an arrear of rent adjudged.

With regard to the *second* objection, we observe that Section 27 of the Act does not apply. Special respondent does not possess an intermediate transferable right between the zemindar and the cultivator. He stands in the place of the cultivator himself, whose rights and interests in the land he bought. He was not therefore compelled to notify his purchase in the proprietor's register.

The third point taken in special appeal may be shortly disposed of. Doubtless, on a proved and adjudged arrear of rent, a zemindar can oust a tenant in execution of a decree under Act X of 1859, and equally can he bring to sale an under-tenure of the nature held by the ryots of the garden now in suit (Section 105). Had the special appellant followed the latter course and sold the tenure itself, the special respondent's prior lien on it would have been valueless so long as the rent decreed to be in arrear remained unpaid. But, instead of doing this, the special appellant purchased his ryots' "rights and interests" in the land. Now these "rights and interests" had already been sold under a decree of the Civil Court and purchased by the special respondent, so that the zemindar purchased "a bag of wind," and cannot be allowed to oust a party who bought for valuable consideration the actual rights of the defaulting ryots.

We see, therefore, no reason to interfere with the judgment of the Principal Sudder Ameen, and the appeal is accordingly dismissed with costs.

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The 28th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Enhancement—Section 13 Act X of 1859—Farmers.

Case No. 3089 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. J. W. Dalrymple, Judge of Bhaugulpore, dated the 28th April 1863, reversing a decision of Mr. C. B. Skinner, Collector of that District, dated the 26th September 1862.

Nathooram Shaha (Plaintiff) *Appellant,*

versus

Doorga Manjee (Defendant) *Respondent.*

Baboo Aushootosh Dhur for Appellant.

Mr. C. Gregory for Respondent.

Section 13 Act X of 1859 does not apply to farmers holding without or after expiry of their lease.

Loch, J.—The suit was brought to recover enhanced rent after service of notice under Section 13 Act X of 1859. The defendant is a farmer, and the Judge, on appeal, holds that the provisions of Section 13 are inapplicable to farmers. We concur in the opinion come to by the Judge. A farmer holds for a term of years at a fixed rent under a written contract, and on the expiry of that lease has nothing further to do with the estate. During the period of his lease his rent cannot be raised in the manner prescribed in Section 13, and, on the expiry of his lease, the proprietor may grant a renewal on such terms as are mutually agreed upon, or else the farmer must give up the farm or may be ejected under the provisions of Section 25. If the farmer be permitted to hold over after his lease has expired, such holding over will not render the provisions of Section 13 applicable to him. We do not find any ground for admitting a special appeal, and dismiss it with costs.

The 29th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Right to hold at fixed rates—Right of occupancy.

Case No. 3125 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Nuddea, dated the 30th July 1863, affirming a decision of the Deputy Collector of that District, dated the 24th February 1863.

Ramnarain Singh and others (Defendants) *Appellants,*

versus

Huronath Roy and others (Plaintiffs) *Respondents.*

Baboos Mohinee Mohun Roy and *Anund Mohun Thakoor* for Appellants.

Baboos Sreenath Doss and *Bungseedhur Sein* for Respondents.

A right to hold at fixed rates does not necessarily follow a right of occupancy.

Glover, J.—This is one of a number of cognate suits by a landlord against his tenants for enhanced rents.

The defence in the Lower Courts was that the tenants held under pottahs which fixed the rate of rent payable.

Both the Deputy Collector and the Judge have held that these pottahs confer no right of exemption.

It is urged before us in special appeal: (1) that the Judge did not attach sufficient weight to the decision of the Cazee in which the holding was defined to be a "kudeemee" one; and, (2), that the rates of rent have been improperly calculated.

We see no force in either of these objections. It is not denied, indeed it cannot be, for the wording of the pottah is very clear and precise on this point, that the original grantee was exempt from any enhancement of rent during the time he held the jote. The pottah says distinctly, "So long as you retain the land, no higner rent will be demanded of you;" but there is no provision in it that makes this privilege hereditary, or extends to sons and grandsons the indulgence originally granted as a personal favor to the ancestor. In the terms of the pottah the tenant to whom it was given was, after all, merely a tenant-at-will. He was to hold the land at a fixed rate during his period of occupancy, but his occupancy was terminable at any time.

So, then, the Cazee's decision relied on by the special appellants did not touch the real point at issue in this case, which is not whether the original grantee had an interest at fixed rates, but whether those interests are heritable.

It has been ingeniously argued by the special appellant's pleader that, as the ancestor's temporary rights have become by the action of Act X of 1859 permanent in the person of his descendants so far as regards occupation of the land, the right of holding at fixed rates ought to follow the right of occupancy; in other words, as what was originally a privilege has now become an absolute right, namely, the occu-

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pancy, so that which was an absolute right from the first, the payment of rent at fixed rates, must remain in the same position.

This argument is, we think, more plausible than sound. A right of occupancy is obtained simply by remaining 12 years in the land. Any squatter, if he can succeed in fixing himself on an estate for that time, is entitled to retain his holding so long as he pays rent for it; but a right to hold at fixed rates of rent is a special privilege which can only be obtained by a direct permission on the part of the landlord. The mere fact of a grandfather being allowed to hold at a certain fixed rent is no argument in favor of the grandson, unless there be some special mention in the lease conferring hereditary right.

The pottah in this case allowed the original grantee to hold the land at a certain fixed rate so long as he continued in possession. The act was a personal one, confessedly revocable by the landlord, who could have terminated the tenant's possession at any time, and cannot, we think, be made to go down to descendants in the third degree. Had the special appellants brought their suit on the ground that they had paid an unvarying rent from the date of the Decennial Settlement, the proof which they would give of having paid the same uniform rate of rent for more than 20 years would have stood them in good stead and have saved their tenure from enhancement; but, as they go upon pottahs the dates of which are posterior to the settlement, and which, in our opinion, only confer personal rights, they can have no defence against the landlord who now wishes them to pay at the rates usual in the pergunnah.

The second objection may be disposed of very shortly. The rates were fixed by local enquiry, which corresponded, in all its details, with a former one held some years previously in another suit. The Judge found the rates proved by the local enquiry and by evidence recorded in the nuthee. This, therefore, is a question of fact, with which we have nothing to do.

We, therefore, affirm the decision of the Judge and dismiss the appeal with costs.

The 30th June 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Suit for Rent—Mortgage.

Case No. 2780 of 1863 under Act X of 1859. *Special Appeal from a decision passed by Mr. O. W. Malet, Judge of Beerbhoom, dated the 30th June 1863, reversing a decision of Baboo Radhanath Gangooly, Deputy Collector of that District, dated the 19th March 1863.*

Bissoroop Dutt (Plaintiff) *Appellant,*

versus

Binode Ram Sein (Defendant) *Respondent.*

Baboos Luckee Churn Bose and *Woomesh Chunder Mitter* for Appellant.

Baboos Tarucknath Sein and *Banee Madhub Banerjee* for Respondent.

A mortgagee who executes a lease in favor of a mortgagor stipulating to pay him a certain amount annually as rent, is, as far as the payment of that sum is concerned, a tenant of the mortgagor, and must be sued for any arrears of such rent under Act X of 1859.

Jackson, J.—THIS was a suit for arrears of rent due under an izara lease. The case was decided on the merits by the first Court; but on appeal the Judge held that the lease, being of the description called zur-i-peshgee, was in fact a mortgage, and that, although there was a stipulation in the lease that the mortgagee, who was put into possession of the land, should pay a certain portion of the rents to the mortgagor, still the parties were not in the position of landlord and tenant, and any suit for breach of the contract would consequently lie, not under Act X of 1859, but in the Civil Courts.

There is no doubt that, as a general rule, a mortgagor and mortgagee do not stand in the relation of landlord and tenant; but their position depends altogether upon the terms of their contract. If the mortgagee executes a lease in favor of the mortgagor, stipulating to pay him a certain amount annually as rent, he is, as far as the payment of that sum is concerned, a tenant of the mortgagor, and any arrears of such rent must be sued for under Act X of 1859.

This was the position of the parties in this suit. But the plaintiff has claimed other items from the defendant beyond what he stipulated to pay as rent The plaintiff has sued for a certain sum, which the defendant was, under the terms of the lease, bound to pay, for the Government revenue and for mooktear's fees, which sum the plaintiff paid on the recusance of the defendant. The

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plaintiff cannot, however, sue for these sums under Act X of 1859. His suit must be confined solely to the amount of rent which the defendant agreed to pay to the plaintiff year by year The Judge's order dismissing the suit is reversed, and the case is remanded to him for trial on the merits as respects the rent which the defendant agreed to pay plaintiff.

The 30th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Enhancement — Mokururee— Shareholder.

Case No. 3265 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 27th August 1863, *modifying a decision of the Assistant Collector of that District, dated the 9th July* 1863.

Salgram Opadhya and others (Plaintiffs) *Appellants,*

versus

Maharaja Moheshur Bux Sing (Defendant) *Respondent.*

Mr. G. Gregory for Appellants.

Baboos Kalee Kissen Sein and *Moonshee Ameer Ali* for Respondent.

The fact that a mokururedar has for any reason agreed to pay an enhanced rent to one shareholder, does not entitle another shareholder to demand enhanced rent, except according to Section 13 Act X of 1859.

Loch, J.—PLAINTIFF is the owner of a 4 annas share of Mouza Sumotha. One Debi Buksh held another 4 annas share, which was confiscated to Government during the Mutinies The defendant holds a mokururee in the said village, and appears to have entered into an engagement with Government to pay an enhanced rent on the 4 annas belonging to Government, and plaintiff now brings a suit to recover from the defendant rent at the same rate as that which he pays to Government.

The Judge, on appeal, has dismissed the suit on the ground that the plaintiff has failed to show that he ever collected the sum now claimed, and in the absence of the pottah no question could be raised as to its terms.

We think the Judge's decision to be quite correct. The fact that the mokururedar has, for any reason, agreed to pay an enhanced rent to one shareholder, does not entitle another to demand enhanced rent, unless he has followed the course prescribed in Section 13 Act X of 1859, when the right to claim the enhancement would be tried and determined. We dimiss the appeal with costs.

The 30th June 1864.

Present:

The Hon'ble H. V. Bayley and Sumbhoonath Pundit, *Judges.*

Jurisdiction—Suit for perpetual pottah.

Case No. 3068 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. G. G. Balfour, Judge of Chittagong, dated the 30th July 1863, *affirming a decision of Baboo Bhugwan Chunder Bose, Deputy Collector of that District, dated the 30th August* 1862.

Koylas Chunder Dey (Defendant) *Appellant,*

versus

Koylas Chunder Sein (Plaintiff) *Respondent.*

Moulvie Murhumut Hossein for Appellant.

Mr. A. F. Lingham for Respondent.

A suit for a perpetual pottah cannot be tried under Act X of 1859.

Pundit, J.—THIS and three other cases are connected with each other. Three are suits

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instituted by the special appellant, as auction-purchaser, for assessment of certain lands held by the respondent, and the fourth is the plaint of the latter for obtaining a pottah from the special appellant in confirmation of the istemraree pottah given to the said respondent by the former proprietor. In the three cases first mentioned, the respondent pleads the istemraree pottah he relies upon in the plaint of his own case, and in the latter case the special appellant denies the pottah, and further pleads that no incumbrance created by the defaulter could be binding against an auction-purchaser.

The pottah was found to be genuine by the first Court, and it further held that the special appellant being the purchaser of only one anna of an estate and not of the "entire" estate, under Section 37 of Act XI of 1859, could not enhance. Accordingly, that Court dismissed the three suits of the special appellant, and decreed the case of the respondent. Against these decisions special appellant appealed to the Lower Appellate Court, and that Court dismissed the appeals simply on the ground that it coincided with the Lower Court in holding the pottah to be genuine.

Against these decisions special appeals are preferred to this Court in all the four cases. In the case of the respondent, the special appellant complains that no action for obtaining a perpetual pottah could be tried under Act X of 1859. We quite agree with the special appellant that the case brought by the respondent was perfectly unnecessary and could not be tried by the Collector. The question of the genuineness of the pottah could be only and has been tried in the other cases.

In the other three cases the special appellant pleads that the Lower Appellate Court has not tried how far the genuineness of the pottah of the respondent affects the rights of the special appellant as an auction-purchaser. This plea was distinctly laid before the Lower Appellate Court, and the special appellant further pleaded that he is the purchaser of an entire estate. These two pleas do not appear to have been decided by the Lower Appellate Court We therefore decree the appeal of the special appellant, and dismiss the suit of the respondent in the suit of the latter, with costs of all the three Courts, and remand the other three suits of the special appellant to the Lower Appellate Court, that, holding its finding regarding the pottah to be good, it should try the effect of the same against the special appellant as an auction-purchaser, and his position as such, with reference to the above remarks.

The 30th June 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Evidence (of rent)—Remand (for additional evidence).

Case No. 3494 of 1863 under Act X of 1859

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 30th September 1863, reversing a decision of Baboo Mohendronath Mitter, Moonsiff of Satkhira, vested with the powers of a Deputy Collector, dated the 10th July 1863.

Chundercoomar Roy (Plaintiff) *Appellant,*

versus

Zeemnutoollah Sirdar (Defendant) *Respondent.*

Baboos Sreenath Doss and *Bungshee Dhur Sein* for Appellant.

Baboo Opender Chunder Bose for Respondent.

A decree in a former suit declaring the rent payable by a ryot is evidence of the rent still payable by him, unless rebutted by him by proof of change.

A Judge on appeal should not remand a case for additional evidence, but should take such evidence himself.

Steer, J.—The plaintiff sues for arrears of rent on account of 1267, 1268, and 1269, at Rs. 215. He gave as evidence of the rate of rent a decree of Court, holding rupees 215 to be the rent to which the defendant was liable. The defendant pleaded that his jumma was rupees 150, and he pleaded payment.

The first Court held that the decree for rent for 1262 was the very best evidence as to what the rent actually is; and in respect to the payments, it discredited the evidence of the witnesses whom the defendant produced to prove them.

The Judge held that the former decree, ruling the rent to be rupees 215, was no evidence in this suit. He accepted the defendant's statement that the rent was rupees 150, and he remanded the case in order that Hollodhur, who wrote the receipts, might be summoned, and other receipts given by him might be produced for comparison with the disputed receipts in this case.

We think that the decree which held the defendant's jumma to be rupees 215 in

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1262, is evidence that that is the jumma now, unless the defendant can show that the rate of rent depends on the quantity of land in his occupation from time to time, or that the jumma has since been abated. The decree is *primâ facie* evidence of the jumma, and unless the defendant is able to plead that the jumma, as settled by the decree, has since been altered, or, for stated reasons, was not the jumma now, and succeeds in proving what he pleads, the former decree must be taken to be evidence that the jumma is now what it was when the decree was passed. On this point we hold, then, that the Judge was wrong; and, as the defendant has not stated any circumstances tending to show that the jumma is subject to variation, or has since been abated, we uphold the decision of the first Court which held the jumma to be 215 rupees.

In respect to the order of the Judge requiring further evidence in regard to the receipts, we must remark that the Judge ought not to have remanded the case, but he should have called upon the defendant to summon before himself the writer of the dakhilas and to produce some undisputed receipts of his. The Judge below has examined all the evidence the defendant required to be examined; the trial was complete, and there was really no ground on which a remand was legal. What the Judge requires is that additional evidence should be taken, and he is competent and ought to take this evidence himself. The Judge will accordingly keep the record on his own file, and, after calling for the evidence which he thinks necessary, determine whether the finding of the Lower Court, on respect to the receipts, is correct or not.

With these remarks the case is remanded to the Judge.

The 30th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Jurisdiction—Ejectment.

Case No. 3291 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 25th of September 1863, *reversing a decision of the Sudder Ameen of that District, dated the 22nd August* 1862.

Wooma Sunkury and others (Defendants) *Appellants,*

versus

Syud Ally Ashruff (Plaintiff) *Respondent.*

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Appellants.

Baboos Chunder Madhub Ghose and *Greeja Sunkur Muzoomdar* for Respondent.

Where a zemindar sold a mourosee tenure for arrears of rent and purchased it himself, and then evicted the dur-mouroseedar and made a fresh settlement for the tenure with a third party,—HELD that a suit for ejectment by the dur-mouroseedar against the zemindar is cognizable under Clause 6 Section 23 Act X of 1859.

Loch, J.—THE plaintiff in this case describes himself as a dur-mouruseedar and alleges that he has been ejected by the defendants, zemindars and mouruseedars, under the following circumstances:—Defendants, zemindars, sold the mourusee tenure for arrears of rent and purchased it themselves. They then evicted the plaintiff, their under-tenant, and made a fresh settlement for the tenure with third parties. The first Court dismissed the case; but the plaintiff got a decree in the Lower Appellate Court, and from this decree a special appeal is filed.

The first objection taken is that the suit is cognizable only under Clause 6, Section 23, Act X of 1859, as it is a suit by a tenant to recover possession against his zemindar for having ejected him. It is urged by the respondent that the defendants did not oust him as zemindars but as auction-purchasers, and in the latter character the defendants are strangers to him, and therefore his action to recover must be in the Civil Court. This, however, is not the case, for the defendants, though auction purchasers, were even in that capacity the immediate landlords of the plaintiff. It was to them that he would, in his capacity of dur-mouruseedar, have to pay rent, while their auction-purchase made them mouruseedars immediately superior to the plaintiff, and in this capacity they ousted him. It is clear, therefore, that this is a suit cognizable only under the provisions of Clause 6, Section 23, Act X of 1859, and we therefore decree the appeal, and, reversing the decision of the Lower Court, dismiss the plaintiff's suit with costs in all Courts.

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The 1st July 1864.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*

Presumption — Acknowledgment of payment of old rent.

Case No. 252 of 1862.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 21st December 1861, *reversing a decision passed by the Additional Moonsiff of Kissengunge, dated the 27th April* 1861.

Raja Enayet Hossein (Plaintiff) *Appellant,*

versus

Sheikh Deedar Bux and others (Defendants) *Respondents.*

Baboo Kissen Kishore Ghose and *Moonshee Ameer Ali* for Appellant.

Baboo Kalee Kishen Sein for Respondents.

An acknowledgment of the plaintiff in a former case, of having realized a certain sum of money on account of rent for three years, may afford some presumption that the older items in the account were satisfied, and, if that presumption could not be rebutted, might be an answer to an action on the older demand.

Norman, C. J.—This is a suit for the rents of 1258. The Judge finds that the plaintiff acknowledged, in a former case, that he had realized Rs. 9,190 out of Rs. 11,103 due for 1258, 1259 and 1260, and therefore that it was clear that the plaintiff could not claim any rent for 1258, as none could possibly be due.

That is, however, a clear mistake. The payment of the sum mentioned may afford some presumption that the older items in the account were satisfied, and, if that presumption could not be rebutted, might be an answer to an action on the older demand. But the presumption is capable of being rebutted, and is not one which the Judge was justified in acting upon without considering the other evidence in the case. For instance, as to a part of the money realized, a summary suit was instituted for the rents of 1259, in which suit, under the then existing law, the plaintiff was not at liberty to include the old balance for the rents of 1258. The amount claimed in that suit with interest, Rs. 2,391-10, was realized, but no part of that money was applicable to the satisfaction of the old balance of 1258. The case must be remanded for a proper trial.

The 1st July 1864.

Present :

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Special Appeal (by parties who did not appeal against decision of first Court).

Case No. 830 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 30th December 1862, *affirming a decision of the Deputy Collector, dated the 15th November* 1861.

Boykant Ram Sahoo (Defendant) *Appellant,*

versus

Poorno Chunder Dass (Plaintiff) *Respondent.*

Messrs J. Cochrane and *C. Gregory* for Appellant.

No one for Respondent.

Parties who did not appeal from the decision of the first Court cannot appeal specially against the decision of the Lower Appellate Court on the ground that the decision of the first Court prejudiced their rights.

Jackson, J.—This was a suit to recover possession of a tenure from which an under-tenant alleged that he had been dispossessed by the zemindar. The claim was decreed in the first Court. On appeal by the zemindar, that decision was confirmed.

Other parties now appeal specially against the decision of the Lower Appellate Court, on the ground that the decision of the first Court prejudices their rights. Those parties not having appealed from the decision of the first Court, cannot be heard in special appeal. Their appeal is dismissed.

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The 1st July 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Suit for rent (by Putneedar).

Case No. 1364 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. H. S. Thompson, Officiating Additional Judge of Backergunge, dated the 31st January 1863, reversing a decision of Moulvie Ahmed Khan, Deputy Collector of that District, dated the 24th December 1861.

Mahomed Kadir and another (Plaintiffs) *Appellants*,

versus

Brindabun Chunder Sein and others (Defendants) *Respondents*.

Baboos Kali Mohun Doss and *Hem Chunder Banerjee* for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

A suit for rent by a putneedar is only cognizable in the Collector's Court. The fact that the putneedars' interest had ceased before suit, is wholly immaterial.

Norman, C. J.—THIS was a suit instituted under Act X of 1859 by plaintiffs, putneedars, against a ryot, for the rents of 1258 to 1268. The defendant alleged that the plaintiffs had ceased to be putneedars before the commencement of the suit. The Judge finding this to be the case, held that the plaintiffs could not prosecute the suit under Act X, which, he says, was only intended for adjusting differences between actual landholders in proprietary possession and tenants, and therefore reversed the Deputy Collector's decision in favor of the plaintiffs.

We are of opinion, however, that the suit being a suit for arrears of rent, was properly brought in the Collector's Court, and in fact, under Section 23 Act X of 1859, could not have been instituted in any other Court. The fact that the putneedars' interest had ceased before suit, is wholly im material

We therefore reverse the decision of the Judge, and remand the case to him for trial upon the merits.

The 1st July 1864.

Present:

The Hon'ble H. V. Bayley and Sumbhoonath Pundit, *Judges*.

Registration (of transfer of tenure).

Cases Nos. 3076 to 3080 of 1863 under Act X of 1859.

Special Appeals from decisions passed by Mr. H. S. Thompson, Officiating Additional Judge of Backergunge, dated the 30th March 1863, reversing decisions of Baboo Ram Chunder Paul, Deputy Collector of that District, dated the 7th May 1862.

Mr. J. C. Sarkies (Plaintiff) *Appellant*,

versus

Kali Coomar Roy and others (Defendants and Objectors) *Respondents*.

Baboos Gopal Loll Mitter and *Romanath Bose* for Appellant.

Baboos Khetternath Bose and *Kali Mohun Doss* for Respondents.

Mere cognizance or supposed cognizance by the zemindar of the fact of a party having purchased a tenure is not sufficient to cure the defect of non-registration of such tenure in the zemindar's serista.

Bayley, J.—THE pleaders admit that our decision will govern these five cases.

The objection in special appeal is that the Lower Appellate Court has improperly ruled that mere cognizance or supposed cognizance of the zemindar of the fact of a party having purchased a tenure is sufficient to cure any defect arising from non-registration of such tenure in the zemindar's serista.

The current of decisions on this point has uniformly been that a zemindar is not bound to recognize any transfer in regard to which application has not been made to have such transfer registered in the zemindaree serista unless it can be proved that the zemindar has not only known of the transfer, but has also *accepted* the transferee as his tenant; and the receipt of rent by the zemindar after such transfer has been held as one of the best proofs of the fact of a zemindar having so accepted the transferee.

The Lower Appellate Court has held that mere cognizance is sufficient, and has cited a case of the 7th September 1861, as favoring his view. But we cannot find this case, nor has the pleader for the respondent, arguing in support of the judgment below, been able to produce it or anything to the same effect. The plea therefore of special appellant, so far as it goes, is valid But, on the other hand,

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it is to be observed that the respondent clearly pleaded that payments had been made and accepted by the zemindar after the transfer. The Lower Court alludes to the production of the alleged dakhilas evidencing such payments in another case, but that was not one in which the zemindar was a party. The Lower Court, however, in this case, did not investigate and adjudicate whether the alleged payments were proved or not, and it is still open for respondent to prove such payments if he can. We accordingly remand this case for re-trial with reference to the above remarks, and for re-decision according to the result.

The 2nd July 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Jurisdiction—Section 24 Act X of 1859—Suit against Agent.

Case No. 3263 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Lieut.-Colonel E. T. Dalton, Judicial Commissioner of Chota Nagpore, dated the 27th August 1863, *affirming a decision of the Deputy Commissioner of Hazareebagh, dated the 30th June* 1863.

Lalah Jebun Lall (Defendant) *Appellant,*

versus

Tekait Pokhurun Singh (Plaintiff) *Respondent.*

Baboos Chunder Madhub Ghose and *Debendro Narain Bose* for Appellant.

Mr. C. Gregory for Respondent.

The words "management of land" in Section 24 Act X of 1859 are not confined to the local agents or gomastahs whose duty it is to make arrangements for the cultivation of waste or unoccupied lands in their villages, but may be extended to agents who are employed in giving leases and against whom a suit is cognizable in the Collector's Court under that Section.

Loch, J.—The plaintiff in this case brought an action against the defendant, special appellant, and another, for an account of monies received for the plaintiff, estimated at 45,000 rupees. This sum comprised monies received from the Collector's Treasury, as well as rents from the estate of the plaintiff. The defendant, special appellant, is styled the dewan of the plaintiff, and is said in the plaint to have had authority to make settlements of the villages appertaining to the plaintiff's estate, and appears to have been a general manager of his affairs.

The Lower Courts have held that any claims which the plaintiff may have against him for sums received from the Collector's Treasury or individuals, not being rents of land, were not cognizable by the Collector; but in regard to a sum of Rs. 9,215-3 received on account of rent from Assin to Jeyt 1269, the suit is cognizable, and as he can account only for Rs. 9,056-13-3, the first Court decided that he was liable for the difference, and gave a decree for the amount with costs, and at the same time directed him to render an account of the same. The order of the first Court was confirmed in appeal.

In special appeal it is urged that, under the precedents of this Court, any suit for account against appellant must be brought in the Civil Court, as he does not come under the designation of an agent employed in the collection of rents mentioned in Section 24 Act X of 1859, and therefore a suit against him is not cognizable in the Collector's Court.

It has been ruled by this Court that a party remaining at the sudder cutcherry of the zemindar, whose duty it is to receive rents sent in by the gomastahs and other local agents, is not an agent employed in the collection of the rents under the meaning of the words used in Section 24 Act X of 1859, and that, consequently, a suit is not cognizable in a Collector's Court against such a party. In this opinion we concur. Such a servant is in fact a treasurer or accountant, and must be treated as such, and claims against such servants can lie only in the Civil Court. But the appellant in this case does, we think, come under the designation of "agent employed in the management of land or collection of rents," for we find from the plaint (and it is an allegation which has not been contradicted) that defendant was employed in the management of the estate by making settlements, giving leases, &c., and in this capacity we gather from the proceedings that he received

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rents direct from the lessees. Now, we do not think that the words "management of lands" must be confined to the local agents or gomastahs whose duty it is to make arrangements for the cultivation of waste or unoccupied lands in their villages, but may be extended to agents employed, as the special appellant in this case appears to have been, in giving leases; and therefore his higher position or high-sounding title will not prevent his being sued for an account under Section 24 Act X of 1859.

A second objection taken is that the plaintiff's account was brought on a *Terij* or memorandum prepared by himself and supported by no proof, and that the Lower Courts have accepted this memorandum, and, without calling upon the plaintiff to prove the items claimed, or produce his account-books which were in his cutcherry, have passed a decree in his favor.

It is urged, on the other hand, that the defendant left the plaintiff's service suddenly, without making over charge of the account-books to any one authorized by plaintiff to receive them, and they have remained in the cutcherry as he left them. They may be said to be constructively still in his possession. The plaintiff prepared his memorandum from such means as he had at hand, and it was for the defendant, who had the charge of the accounts, to disprove it if incorrect. On the trial he could have required the production of the books from the plaintiff's cutcherry.

We think that the plaintiff should have been called upon to prove the items of this account; but as the defendant does not appear to have anywhere distinctly denied its correctness, we think it unnecessary to remand this case for further investigation on this point.

On the third objection raised, *viz.* that, as the first Court has, after an inspection of the account, determined the sum due by the defendant, it should not have given a further order for fresh account of the same period. We think this is right. Plaintiff must be content with his decree for the sum specified; and in regard to costs, we think that costs in the original suit should have been awarded in proportion to the amount decreed and dismissed, and award them to the defendant accordingly. The orders of the Lower Courts will be modified as above, and the appeal decreed with costs.

The 2nd July 1864.

Present:

The Hon'ble G. Loch and F. A Glover, *Judges.*

Presumption (under Section 4 Act X of 1859).

Case No. 3281 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 6th August 1863, reversing a decision of the Assistant Collector of that District, dated the 21st May 1863.

Bhoyrubnauth Sandyal (Plaintiff) *Appellant,*

versus

Mutty Mundle (Defendant) *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

Section 4 Act X of 1859 does not require the defendant to plead uniformity of payment from the time of the Permanent Settelment, but provides that if, on the trial of a suit, it appear that the rent has not been changed for 20 years, it shall be presumed that the land has been held at that rate from the time of the Permanent Settlement.

Loch, J.—The plaintiff, a putneedar, sued to recover enhanced rent, after service of notice, at the rate mentioned in the notice.

Defendant pleaded that he held the lands at a fixed jumma, which jumma had not been changed for more than 20 years, and he produced receipts for rent extending over that period, and at the same time filed a pottah dated 19 Kartick 1247, fixing the jumma payable by him at Rs. 5 per annum, and making his tenure hereditary.

The Assistant Collector decreed the claim, and, considering the pottah produced by the defendant to be a forgery, ordered his committal to the Sessions.

An appeal was preferred to the Judge, who has reversed the order of the Assistant Collector, holding that it was unnecessary to enquire into the genuineness of the pottah, and that, as defendant's allegation of occupancy at a uniform rate of rent for 20 years had been established, his jumma could not be enhanced.

In special appeal it is urged, 1*st*, that the evidence filed by the defendant rebuts the presumption arising from Section 4 Act X of 1859, and therefore plaintiff need give no proof to the contrary; 2*nd*, that, as defendant chose to file a pottah in support of his claim, he was bound to prove it.

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On the other hand, it is urged that the defence did not rest on the pottah, which is not pleaded nor referred to in the defendant's answer, but it rested on proof of a uniform payment of rent for a period of more than 20 years: and this being proved by the dakhilas filed by defendant, the presumption is that the same jumma has been paid from the time of the Permanent Settlement, which presumption plaintiff has failed to rebut, and that the pottah was merely put in as collateral proof.

The pottah is to the effect that the defendant's father had held the land in question for many years; that the zemindar's amlahs were now demanding increased rent from the tenant (defendant), who asked to have his lands measured and a pottah given for the same; that the zemindar gives him a pottah in compliance with his request, permitting him to hold the land in perpetuity, and his descendants after him, at a fixed jumma of Rs. 5.

The appellant contends that this pottah takes away the presumption arising from the payment of a uniform rent for 20 years; further, that defendant does not plead a uniform payment from the Permanent Settlement, adducing the dakhilas for 20 years in support of such allegation, and leaving it to be presumed that he has been paying at that rate all along; but he pleads a fixed jumma, and produces his pottah in proof of his jumma being fixed, and having filed it, plaintiff is entitled to make use of it against him.

If, for argument's sake, we accept the pottah as genuine, it merely assists to support a fact already established by other evidence, that the defendant has been paying rent at the jumma mentioned in the pottah for more than 20 years, for we find that he has produced dakhilas of years previous to the date of the pottah. The terms of the pottah prove that the defendant's occupancy did not then commence, but that it had been held by his father before him, and the proof of the payment of a uniform rent for 20 years raises the presumption that this rate has been paid from the Permanent Settlement. The pottah certainly limits the occupancy of the tenure to the time of the defendant's father, but when that commenced is not shown us. It might have extended so far back as 1790, and it was for the plaintiff, having the opportunity given him by the wording of that document, to prove that the tenancy commenced at a time subsequent to the Permanent Settlement, and then defendant might have been called upon to prove his pottah. Even supposing the pottah to be spurious, the defendant has proved by his receipts, which are unchallenged, that he has paid a uniform rate for more than 20 years. Section 4 Act X of 1859 does not require, as erroneously supposed by the vakeel for the appellant, the defendant to plead uniformity of payment from the time of the Permanent Settlement, but provides that if, on the trial of a suit, it appear that the rent has not been changed for 20 years, it shall be presumed that the land has been held at that rate from the time of the Permanent Settlement, and it was for the plaintiff to show that the presumption in this case was untenable, which he has not attempted to do. We see no ground for interfering with the decision of the Judge, and dismiss this appeal with costs.

The 4th July 1864.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Clause 4 Section 26 Act I of 1845—Enhancement (by auction purchaser)—Garden lands.

Case No. 2194 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 6th of May 1863, affirming a decision of the Deputy Collector of that District, dated the 8th August 1862.

Siddessuree Chowdhrain (Plaintiff) *Appellant,*

versus

Kissoreekant Gossain (Defendant) *Respondent.*

Baboo Dwarkanath Sein for Appellant.

Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Respondent.

In order to obtain the benefit of Clause 4 Section 26 Act I of 1845 (protecting garden lands from enhancement), it is not sufficient that the notice of enhancement should describe the lands as garden lands, but there must be a clear finding that the lands have been held as such under *bonâ fide* leases.

Bayley, J.—In this case, plaintiff, an auction-purchaser, sued with a notice under Regulation V of 1812 to enhance the rents of the defendant's lands. Defendant pleaded that they were garden lands, and, therefore, exempted as to any greater rents than those admitted by him to be due.

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The first Court held that defendant's lands being garden were protected from enhancement by Clause 4 Section 26 Act I of 1845; that the notice was incorrect; and that plaintiff had injured his case by taking no action in the matter for 12 years. The first Court, therefore, gave plaintiff a decree only for the rents admitted by defendant to be due.

The Judge on appeal held to the same effect, adding that the plaintiff's notice itself termed the lands "*bagh*" or garden lands.

Against this decision plaintiff now appeals specially, urging that both the Lower Courts are wrong in their application of the law cited; that it is not sufficient that the law should be held to apply because the descriptive word "*bagher*" is used in that sense only in the notice; and that the law cited could only properly apply upon a clear finding that the lands had been held under the *bonâ fide* leases and in the character described in Clause 4, and that such finding was not on the judgments below. It was also intimated on the other side that there was no clear finding as to whether the notice was legal or not.

We consider both these objections valid on the face of the judgment, and remand the case accordingly for re-trial with reference to the above remarks.

The 4th July 1864.

Present:

The Hon'ble Sumbhoonath Pundit and G. Campbell, *Judges.*

Rent — Enhancement — Intermediate holder's tenants.

Case No. 3104 of 1863 under Act X of 1859.

Special Appeal from a decison passed by the Additonal Judge of Nuddea, dated the 30th of July 1863, *reversing a decision of the Deputy Collector of that District, dated the 28th April* 1863.

Doyal Chand Mullick (Defendant) *Appellant,*

versus

Prankisto Pal Chowdhry (Plaintiff) *Respondent.*

Baboo Ashootosh Dhur for Appellant.

Baboo Mohendro Lall Shome. for Respondent.

A zemindar, on ousting his intermediate holder, is entitled to collect from the intermediate holder's tenants only the rents which were payable to the intermediate holder, and cannot enhance those rents without proceeding in the regular way.

Campbell, J.—PLAINTIFF, the zemindar, seeks to recover rent from defendant who is not his own tenant but was a tenant under an intermediate holder, one Kedarnath. Kedarnath fell into arrears and was ousted by the landlord, who now seeks to take from Kedarnath's tenant a fair and reasonable rent. The defendant pleads that he paid a certain rent to Kedarnath, and is willing to pay that rent to the present plaintiff, but no more.

The Lower Appellate Court decided that defendant is liable to pay the rent assessed by the Court as a fair and proper rent.

We think that the plaintiff having ousted Kedarnath stands in Kedarnath's shoes, and is entitled to collect from Kedarnath's tenants the rents payable to Kedarnath. But we think that he cannot increase those rents without proceeding in the regular way giving fair notice of enhancement and suing to assess. We, therefore, decree this appeal, and remit the case to be tried on the basis above mentioned, *i. e.* to determine what rent defendant contracted to pay to Kedarnath.

The 5th July 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Jurisdiction — Suit for rent of land with house on it.

Case No. 3532 of 1863.

Special Appeal from a decision passed by Mr. T. Tucker, Judge of Shahabad, dated the 22nd September 1863, *reversing a decision passed by Mr. S. DaCosta, Sudder Ameen of that District, dated the 16th April* 1863.

Shaikh Nasur Ali and others (Plaintiffs) *Appellants,*

versus

Saadut Ali and another (Defendants) *Respondents.*

Moulvie Aftabooddeen Mahomed for Appellants.

Mr. A. F. Lingham for Respondents.

A suit to determine the rent of land with a house on it does not lie in the Civil Court.

Steer J.—THIS is a suit to determine the rent of a bit of land with a house on it.

The Judge has held that the action does not lie in the Civil Court, and that is clearly a right decision. The special appeal is, accordingly, dismissed with costs.

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The 5th July 1864.

Present:

The Hon'ble Sumbhoonath Pundit and F. A. Glover, *Judges.*

Abatement of rent.

Case No. 3159 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Officiating Additional Judge of the 24 Pergunnahs, dated the 16th July 1863, affirming a decision of Moulvie Fukeer Ahmed Khan, Deputy Collector of Buseerhut, dated the 28th February 1863.

Horromonee Chowdrain (Plaintiff) *Appellant,*

versus

Ooma Churn Bose and others (Defendants) *Respondents.*

Baboos Kali Mohun Dass and *Roy Sreenath Sein* for Appellant.

Baboo Romanath Bose for Respondents.

A decree allowing an abatement of rent for the only year for which the order of abatement could then be passed, was held not to limit the right of abatement to that year, or to prevent the application of the same redress to any other anterior period in a case in which the question might arise.

Pundit, J.—Plaintiff, zemindar, objects that the ryot, under the terms of his kubooleut, is not entitled to any abatement before the year 1274. It has already been decided by this Court, in a case brought by the ryot for abatement, that, on the ground of the lands in his possession being less than the quantity allowed to him by the pottah, he is entitled to a proportionate deduction notwithstanding anything in his kubooleut.

The special appellant further argues that, as this decree for abatement allows deductions only from 1269, the ryot cannot claim any further abatement backwards for the years for the rents of which the special appellant has sued in this case.

It is clear that the decree in the other case only settled a question of principle, *viz.* that, notwithstanding the kubooleut, the ryot was, on the ground of the non-existence of certain lands, entitled to a proportionate deduction; and, as in that case, the year 1269 was the only year for which the order for abatement could be passed, it was passed only for that year. It was never intended by that decision to limit the right of abatement to the said year 1269, or to prevent the application of the same redress to any other anterior period in a case in which the question was to arise. Plaintiff having in this case sued for the rents of the years 1266 to 1268, both inclusive, the ryot pleaded the ground of abatement, which has properly been allowed with reference to the decree in the other case and to the proof of the non-existence of certain lands. We accordingly reject the special appeal with costs.

The 7th July 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble F. B. Kemp, *Judge.*

Section 14 Act X of 1859—Putnee.

Case No. 2770 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 6th of June 1863, affirming a decision of the Deputy Collector of that District, dated the 31st January 1862.

Hurro Mohun Mookerjee (Plaintiff) *Appellant*

versus

Brojokishore Roy and others (Defendants) *Respondents.*

Baboos Banee Madhub Banerjee and *Mohendrolall Shome* for Appellant.

Baboo Dwarkanath Sein for Respondents.

Section 14 Act X of 1859 does not apply to the case of a purchaser of a putnee talook at a sale under Regulation VIII. 1819, unless the jumma is shown to be a mesne incumbrance which came into existance subsequently to the creation of the putnee.

Norman, C. J.—The plaintiff, the purchaser of a putnee talook at a sale under Regulation VIII of 1819, sued for an enhanced rent of 127 rupees in respect of 60 beegahs of land, a jote in Mouzah Sheekund. The defendant pleaded that the quantity of land was 29 beegahs 5 cottahs; that he had a mokurruree right; and that the tenure was not liable to enhancement. An Ameen was deputed to measure the land, who found 56 beegahs 17 cottahs 10 chittacks in defendant's possession. On appeal, the Judge found the defendant's jumma to have been held at 30 rupees sicca from before the Decennial Settlement, and dismissed the suit.

On appeal it is contended before us that the 14th Section of Act X did not apply to the case of a purchaser under Regulation VIII of 1819. But in order to support that argument, if it is worth anything, the plaintiff should have shown that the jumma was a mesne incumbrance which came into existence subsequently to the creation of the putnee. This the appellant failed to do.

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Secondly, it was objected that the Judge has decided nothing as to any land held by defendant in excess of that comprised in the defendant's mokurruree pottah.

On this point, if the plaintiff's contention is well founded, he may hereafter give notice of enhancement in respect of any lands held in excess of the quantity comprised in the mokurruree pottah.

The decision is affirmed with costs and interest.

The 7th July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Jurisdiction of Revenue Courts—Ejectment—Deeds of Sale.

Case No. 944 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 17th of January 1863, reversing a decision of the Deputy Collector of that District, dated the 8th July 1862.

Doyal Chand Ghose and others (Plaintiffs) *Appellants,*

versus

Dwarkanath Misser (Defendant) *Respondent.* Appellant in person.

Baboo Khetter Mohun Mookerjee for Respondent.

A Revenue Court, though competent to dispose *finally* of a question of dispossession, cannot pronounce a final opinion on the genuineness of a deed of sale adduced to prove the dispossession.

Seton-Karr, J.—THE special appellant, who appears in person, contends before us that the Judge's remarks as to the genuineness of the kobala were wholly beyond the merits of the case which the Courts had to try; that both the Lower Courts, sitting purely as revenue tribunals, though competent to dispose of a tenant's claim in an action of recovery, were not competent finally to pronounce on deeds like the kobala in question, which are deeds of title, and which involve questions of right.

After hearing the pleader for the respondent, we are of opinion that there is force in these objections. The Deputy Collector or first Court could not finally dispose of a question of title, though he might properly consider the kobala as far as it asserted the fact of the dispossession, which was the question at issue before him. And the Judge, when he had finally disposed of the appeal from the Revenue Court, could not give an expression of opinion which could be final, regarding a document on which no Civil Court, the first Court being a Court of Revenue, had yet adjudicated, and which should be reserved for those Courts alone.

We declare, therefore, that though the decision of the Judge as regards the dispossession is final, and is not now questioned by us, the remarks of either Court regarding the validity of the *kobala* are not final and must be no bar to a trial of this point in the regular Civil Courts, should either party wish to put the same in issue.

Each party may pay his own costs in this appeal, and the special appellant must pay all the costs of the Courts below.

The 7th July 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble F. B. Kemp, *Judge.*

Appeal—Suit for rent below 100 Rs.—Section 153 Act X of 1859.

Case No. 2627 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 19th of June 1863, reversing a decision of the Deputy Collector of that District, dated the 30th March 1863.

Bacharam Sahoo (Defendant) *Appellant,*

versus

Dinobundhoo Paul (Plaintiff) *Respondent.*

Baboo Nobokisto Mookerjee for Appellant.

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Respondent.

In a suit for rent below 100 rupees, where the question was not whether the plaintiff had a right to enhance or vary the rent, but simply what was the amount of rent due under the agreement subsisting between the parties,—HELD that, under Section 153 Act X of 1859, the appeal lay to the Collector and not to the Judge.

Norman, C. J.—THIS was a suit for rent. The amount sued for being rupees 27, the Deputy Collector dismissed the suit. The plaintiff appealed to the Judge, who, after remanding the suit to try whether the defendant had executed a certain jummabundee, gave a decree in favor of the plaintiff. The defendant appeals to this Court, on the ground that the Judge has no jurisdiction, and that,

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under Section 153 of Act X of 1859, the appeal should have been to the Collector.

We think that the contention of the defendant is correct. The question was not whether the plaintiff had a *right* to enhance or vary the rent, but simply what was the amount of rent due under the agreement subsisting between the parties.

We, therefore, reverse the decision of the Judge with costs and interest.

The 7th July 1864.

Present:

Teh Hon'ble G. Campbell and F. A. Glover, *Judges.*

Suit for rent—Plea of Mokurruree—Appeal—Evidence (copies of Income Tax Returns).

Case No. 1927 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Sarun, dated the 4th of May 1863, reversing a decision of the Deputy Collector of that District, dated the 3rd November 1862.

Lalla Gooroo Sahoy Singh (Plaintiff) *Appellant,*

versus

Bromo Deonarain (Defendant) *Respondent.*

Baboo Debender Narain Bose for Appellant.

Baboo Kally Kisto Sein for Respondent.

In a suit for rent where the defendant pleaded a mokurruree right,—HELD that the case involved a substantial right and that the appeal lay to the Judge.

Copies of Income Tax returns were refused to be received in evidence.

Campbell, J.—PLAINTIFF sued for his share of rent as a two annas shareholder in the estate, alleging a certain rate of rent. Defendant pleaded a mokurrruree tenure at a smaller fixed rate. Plaintiff produced certain papers showing his rate. Defendant produced copies of the Income Tax return filed by plaintiff's shareholders in support of his statement.

The Lower Courts, on the ground that the Income Tax returns are more trustworthy than plaintiff's papers, decided in favor of defendant.

Plaintiff appeals on the ground that these papers are not evidence.

Respondent objects that there was no right of appeal to the Judge, and, consequently, none to this Court.

As defendant himself put in issue a mokurruree right, we think that the case involved a substantial right, and that there is an appeal.

We also think that the evidence, on which the decision is founded, is not legal evidence. We do not know how defendant got the Income Tax returns; nor do we apply technical rules of English evidence. But it is a broad principle of justice that primary evidence must, when possible, be given, and that, till it is shewn to be impossible, secondary evidence cannot be admitted. We think that these returns should not have been admitted without proof that the persons who made them were dead; that these persons should have been summoned and examined before receiving the unproved returns. In the event of their evidence contradicting the returns, they might be cross-examined as to their signatures, and the Court might have formed its own conclusions as to the credibility of their evidence; but it was necessary to examine them first. We remand the case for a fresh decision on the whole question whether the rent payable by defendant is that alleged by plaintiff, or whether it is the fixed mokurruree rent alleged by defendant; opportunity of giving evidence being given to both parties.

The 7th July 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge.*

Section 9 Act VI of 1862 B. C.—Survey of lands (by lessee under Court of Wards).

Case No. 2533 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. R. H. Russell, Judge of Midnapore, dated the 13th June 1863, reversing a decision passed by Mr. F. R. Cockerell, Collector of that District, dated the 14th April 1863.

Messrs. R. Watson and Co. (Plaintiffs) *Appellants,*

versus

Bhoonya Koonwar Narian Singh (Defendant) *Respondent.*

Mr. R. T. Allan for Appellants.

Baboos Dwarkanath Mitter and *Sreenath Dass* for Respondent.

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A lessee under the Court of Wards is competent, under Section 9 Act VI of 1862 B. C., to make a general survey of the lands comprised in his lease.

Kemp, J—THIS was a suit on the part of a lessee under the Court of Wards, to exercise the powers vested in him under Section 9 Act VI of 1862, to make a general survey of the lands comprised in his lease.

The defendant objected that his Killah Jameelapore was an independent estate, and that the plaintiff was, therefore, not entitled to exercise the right claimed.

The Court of first instance passed a decision permitting the lessee to measure the lands. The Judge of Midnapore held that, as the Commissioner of Revenue had passed an order to the effect that the tenant was to pay his rent direct into the Government Treasury, the lessee was precluded from exercising the the right of measuring the lands comprised in the Killah.

Mr. Allan, the pleader for the special appellant, has shown us that this order of the Revenue Commissioner has been set aside by the Board of Revenue; and even had it not been so as the Killah is admittedly included in the plaintiff's lease, and the right to receive the rent of the same has been assigned to the lessee by the Court of Wards, his right to survey the lands comprising the the Killah is undoubted. The appeal is therefore decreed, and the decision of the Judge reversed, and that of the Collector confirmed with costs and interest.

The 8th July 1864.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Suit for rent by shareholder—Partition.

Case No. 1926 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. W. T. Tucker, Officiating Additional Judge of Saran, dated the 28th April 1863, affirming a decision passed by Mr. P. Carter, Deputy Collector of that District, dated the 29th October 1862.

Dhurm Lall Singh (Plaintiff) *Appellant,*

versus

Mussamut Jugodumba Koer (Defendant) *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboo Doorga Dass Dey for Respondent.

No claim for rent by a shareholder in an estate held in coparcenery can stand against a party who denies his liability, until the estate is regularly partitioned amongst the co-sharers.

Glover, J—SPECIAL appellant sued for recovery of arrears of rent on a kubooleut. The ryot, defendant, did not appear; but special appellant's co-sharers intervened and denied his claim on various grounds, into which it is not necessary for us to enter here.

The Judge held that the kubooleut was not proved, and that, therefore, as plaintiff was not able to establish an exclusive right to rent, the suit should be dismissed.

We think that the Judge was right. The Civil Court's decision, to which the special appellant was a principal party, decided that no claim for rent would stand against parties who denied their liability until the estate was regularly partitioned amongst the co-sharers. It is clear, therefore, that special appellant has no exclusive right to collect rents; and as he came into Court on the strength of a kubooleut, which kubooleut has been pronounced to be worthless, he can have no "*locus standi*" in the present case; and no question arises into which we can enter in special appeal.

Dismissed with costs.

The 8th July 1864.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Decree for enhanced rent—Appeal.

Cases Nos. 1800, 1811, and 1812 of 1863, under Act X of 1859.

Special Appeals from a decision passed by Mr. H. S. Thompson, Officiating Additional Judge of Backergunge, dated the 24th March 1863, modifying a decision passed by Baboo Judoo Nath Chatterjee, Officiating Moonsiff, with the powers of a Deputy Collector, of Dukheen Shabazpore, dated the 14th April 1862.

Mr. L. Theodorus and others (Plaintiffs) *Appellants,*

versus

Moulvie Abool Burkut Ameenoollah (Defendant) *Respondent.*

Mr. G. Gregory for Appellant.

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Baboo Mohinee Mohun Roy for Respondent.

A Judge is wrong in refusing to decree rent at enhanced rates merely because the judgment which fixed the enhanced rates has been appealed against on a point of law.

Glover, J.—SPECIAL appellant urges that the Judge acted illegally in refusing to decree rent at enhanced rates, merely because the original judgments, in which these enhanced rates were fixed, had been specially appealed to this Court.

The objection must, we think, be allowed. The Judge was quite wrong in refusing to give effect to the provisions of a decree regularly passed on the merits, by a Court of competent jurisdiction, merely because that decree had been appealed against on a point of law. On enquiry, we find that the special appeal referred to was rejected on the 9th of September last; but in any case the Judge had no power to ignore the original decree.

The Lower Court's order is, therefore, reversed with costs on special respondent.

The 8th July 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Evidence—Ex-parte Summary decree for rent.

Case No. 3274 of 1863.

Special Appeal from a decision passed by Mr. L. W. Hutchinson, Additional Principal Sudder Ameen of East Burdwan, dated the 5th May 1863, *affirming a decision of Mr. S. Wright, Sudder Moonsiff of that District, dated the 26th June* 1862.

Anna Purna Dasi (Defendant) *Appellant,*

versus

Joykisto Mookerjee (Plaintiff) *Respondent.*

Baboo Greeja Sunker Muzoomdar for Appellant.

Baboos Baney Madhub Banerjee and *Tarucknath Sein* for Respondent.

Ex-parte summary decrees are no evidence at all of the rate of rent leviable. At the most, they are proof only of what the zemindar considered were the proper rates.

Glover, J.—THIS was a suit to assess certain lands held by the defendant (special appellant in this case) at the pergunnah rates; in other words, to raise her rent from Rs 79 to Rs. 186 odd. The defence was that the tenure had been granted by a former talookdar at the regular pergunnah rates, and that the present landlord was not entitled to ask more.

It appears from the record that this case was once before appealed specially to this Court (*vide* Decisions, S. D. A., 30th January 1858), and was remanded in order that certain issues, which the Lower Court had overlooked at the first hearing, might be tried.

The Court of first instance in this decision held that the land was liable to the increased rent, and assessed that rent at Rs. 146-11-8; a decision afterwards upheld by the Principal Sudder Ameen on appeal, who remarked, moreover, that the directions of the Sudder Court appeared to him to have been properly carried out.

It is urged before us in special appeal; 1*st*, that the *onus* of proving that the rates stipulated in the pottah were the fair pergunnah rates has been improperly laid on special appellant; 2*nd*, that the Lower Courts have gone upon certain *ex-parte* fysalas, and have paid no attention to the nericknamahs filed by special appellant; and, 3*rd*, that the order regarding costs is unjust.

With regard to the *first* objection, we observe that the Sudder Court's decision nowhere lays it down that the *onus* of proof lies on the talookdar. That decision merely recites the then special appellant's objection, and sends the case back on the ground that these, and those of the other side also have been overlooked. The question of *onus* cannot, however, properly arise in this case, the point for decision being simply—"Is the rate at which special appellant's land is assessed a fair rate?" It might possibly have been a fair rate when the pottah was first granted, (although, considering the relationship between grantor and grantee, that of husband and wife, the fact may reasonably be doubted); but that is not a good defence against the claim of an auction-purchaser, who, in all tenures not specially protected, is entitled to demand what is a fair rate *now*. The special appellant has no prescriptive right to hold at fixed rates, but if her contention is to be allowed, she will become at once a "mokurrereedar."

To decide the question of what was the pergunnah rate, no less than three Civil Court Ameens were from first to last sent out, so that in point of fact, although the Principal Sudder Ameen says that the burden of proof ought to rest with the special appellant, neither special appellant nor special respondent

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was made to bear the *onus* of proving the rate. The Court took that upon itself, although it gave special appellant the option of proving that she held at the same rates as her neighbours.

The *second* objection appears to us valid. The Court of first instance fixed the rates simply on some *ex-parte* decrees for rent, and entirely ignored the three several reports of the Civil Court Ameens, and the Principal Sudder Ameen accepted this finding without remark. Now, had the Principal Sudder Ameen formed his opinion upon evidence as regards the rate of rent leviable, we could not, in special appeal, have interfered with his decision. But *ex-parte* summary decrees are no evidence at all of the rate of rent leviable. At the most, they are proof only of what the zemindar considered were the proper rates.

The *third* objection must be disallowed, except as regards that part of the claim from which our present judgment releases the special appellant. The costs will be, of course, charged proportionately. For the rest, as it was through her objections that so many Civil Court Ameens were sent out to make enquiries, it is but reasonable that she should pay their charges, since the result has been against her.

The case must, therefore, be remanded, in order that the Principal Sudder Ameen may go into the question of rates of rent, irrespective of the *ex-parte* decrees, which are not admissible as evidence, and fix the amount accordingly.

The 9th July 1864.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Jurisdiction — Ejectment — Recovery of possession.

Case No. 1048 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Patna, dated the 21st of January 1863, reversing a decision of the Moonsiff of that District, vested with powers of a Deputy Collector, dated the 9th July 1862.

Raj Coomar Singh and others (Plaintiffs) *Appellants*,

versus

Rajbunsee Kooer and others (Defendants) *Respondents*

Moulvie Aflabooddeen Mahomed for Appellants.

Baboos Kishen Succa Mookerjee and *Banee Madhub Banerjee* for Respondents.

A suit to recover possession as against a ryot will not lie under Act X of 1859. The only suits for recovery of possession that are cognizable by the Collector under that Act are suits by a tenant who has been illegally ejected by the person entitled to receive the rent of the land or tenure.

Kemp, J.—This was a suit for possession of one-half of 32 beegahs of mukaddamee lands situated in Mouzah Nuseeroola Chuck, and for mutation of names on the Collectors' rent-roll, by removing the names of Bungsee Singh, the lessee, and Mussamut Rajbunsee Kooer, the mukaddameedar. Mesne profits were also claimed and the reversal of a zur-i-peshgee deed.

The Moonsiff held that the suit had been properly valued at three times the sudder jumma; that the plaintiff had proved that the property in dispute had passed to him by sale for the recovery of the Government revenue. Possession was awarded to the plaintiff with mesne profits and with mutation of names.

On appeal by the defendant, the Judge of Patna, Mr E. F. Lautour, in a decision which to us is perfectly unintelligible, has held that "the rights and interests in the milkeut were "sold, and not the lands; that the plaintiff "is entitled to the malikana placed at the "credit of the judgment-debtor in the Col-"lector's books; and, further, that he is at "liberty to sue a ryot to be put in posses-"sion, but he should do so under Act X "of 1859."

The issues raised in the first Court, and not objected to by the parties, were—

First.—Can mutation of names be effected in respect of lands of this description, or not?

Second.—Have the lands been publicly sold or not?

Third.—On what ground, and from what period, can the defendant be held entitled to the same?

It is clear that a suit to recover possession as against a ryot will not lie under the provisions of Act X of 1859. The only suits for recovery of possession that are cognizable by the Collector under that Act are suits by a tenant who has been illegally ejected by the person entitled to receive the rent of the land or tenure.

We remand the case in order that the Judge may write a clear and intelligible judgment.

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The 11th July 1864.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Putnee—Estoppel.

Case No. 2101 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 30th of April 1863, affirming a decision of the Collector of that District, dated the 5th September 1862.

Muddun Mohun Shaha and others (Defendants) *Appellants,*

versus

Sookomoyee Chowdhrain (Plaintiff) *Respondent.*

Baboos Romesh Chunder Mitter and *Lukhee Churn Bose* for Appellants.

Baboos Kishen Sucea Mookerjee and *Ishur Chunder Chuckerbutty* for Respondent.

Where a former proprietor allowed the putneedar to pay his putnee rent direct to the Collector,—HELD that the present proprietor was not bound by that arrangement.

Glover, J.—THIS was a suit by a zemindar (special respondent) to recover arrears of rent due from his putneedar. The latter admitted the zemindar's right, but alleged that he had the privilege accorded to him by the former proprietor (special respondent's vendor) of paying the rent fixed on his putnee direct to the Collector, and was only bound to pay the balance to the proprietor of the estate.

The Judge held that the special respondent was not bound by this ikrarnamah, and gave him a decree.

We see no reason to interfere in this case. The zemindar, who is responsible (under penalty of having his estate sold for arrears) to Government for the rent, is clearly the party who ought to pay that rent into the Treasury, if he so wills it, and no private arrangement between a putneedar on his estate and a former proprietor can take away his inherent right. The ikrarnamah was only binding on the parties who executed it so long as the arrangement subsisted between them; and even, then, it may be a question whether, on the ground of public policy, such an agreement could have been enforced, for under it the proprietor would be always at the mercy of his under-tenant, who, by neglecting to pay in the rent of the holding, might subject his landlord to the loss of his entire estate.

In the present case it seems to us that the agreement (which formed no part of the original putnee lease) was a mere temporary arrangement for mutual convenience, and that it was terminable at pleasure.

The appeal is dismissed with costs.

The 11th July 1864.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Enhancement — Presumption under Section 4 Act X of 1859.

Case No. 2070 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Sarun, dated the 6th of May 1863, affirming a decision of the Deputy Collector of that District, dated the 17th November 1862.

Beer Kishore Lall (Plaintiff) *Appellant,*

versus

Kunbooly Lall (Defendant) *Respondent.*

Baboos Kishen Succa Mookerjee and *Kally Kishen Sein* for Appellant.

Baboo Onookool Chunder Mookerjee for Respondent.

In a suit for enhancement, where the ryot dates his holding from a certain date and cannot carry it back by presumption to the time of the Permanent Settlement, he is not entitled to the benefit of the presumption under Section 4 Act X of 1859.

Glover, J.—THIS was a suit under Act X of 1859 to enhance rent on 18 beegahs 7 cottahs of land alleged to be held by special respondent without a pottah. The defence was that the ryot had held 16 beegahs 6 cottahs of land from the year 1233 F. S. under a pottah granted by the former proprietor of the estate at a yearly rent of rupees 17-0-9, the 9 pie of which had been afterwards remitted.

The Deputy Collector held that, as the plaintiff (special appellant in this Court) could not show that the rent had ever varied during the last 20 years, or that the ryot had ever been out of possession during the last 12 years, the latter, under Sections 4 and 16 of the Act, was protected from both enhancement and ejectment. The Judge confirmed this decision.

The objections taken in special appeal are:—

(1). That the pottah under which special respondent claims is not proved.

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(2). That the *onus* has been improperly laid, it being for the ryot to show that he had held the land at a uniform rate of rent from the date of the Decennial Settlement.

(3). That no presumption arises in special respondent's favor.

The first objection appears untenable The Judge, though not expressing in so many words his reasons for supposing the pottah to be genuine, clearly means to infer that such was his opinion. On this point, therefore, which is a pure question of fact, we cannot interfere.

On the other grounds, however, we think that the Judge's decision must be reversed. The pottah which dates from the year 1233 F. S. mentions the land as being a "jote sabik" of the then lessee, and recites that, to avoid all future difficulties about rent, the sum to be paid should be so much. There is, however, no memorandum of what the rent was before, and nothing from which it can be supposed that it was the same as now. The inference is indeed the other way; for it was in order to settle disputes about this very matter that the rent was fixed in the pottah. Still, notwithstanding that this document is dated in 1233 F. S only, we might perhaps have conceded the ryot's title as arising from presumption on the words "jote sabik" had he rested his case on the bare fact of his having paid a uniform rate of rent for 20 years; but in his answer to the suit, he specifies his rights particularly, and claims to have held the land in suit at a uniform rate for 35 years, that is, from the date of the pottah, and uses terms which are, we think, inconsistent with his present allegation that he had in fact held at that rate from a much longer period and merely put forward the 35 years' holding in order to establish his claim to the benefit of the 20 years' rule. Under these circumstances he, of course, loses the benefit of the presumption which a 20 years' uniform payment of rent would otherwise have given him. He dates his ownership from a certain year, and cannot carry it back by presumption to the time of the Permanent Settlement. The *onus* throughout is upon him, and he can show no title further back than 1233. His title, then, must rest on the pottah of 1233, and on examining the terms of that pottah, it is clear that there is nothing in it to protect the ryot against enhancement.

We think, therefore, that the land is liable to enhancement, and reverse the decision of the Lower Court with costs.

The 12th July 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Dismissal of suit—Notice of enhancement.

Case No. 3040 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. J. E. S. Lillie, Officiating Judge of Hooghly, dated the 21st August 1863, affirming a decision of Baboo Rakhal Doss Mookerjee, Deputy Collector of that District, dated the 19th May 1863.

Chunder Coomar Roy and others (Plaintiffs) *Appellants,*

versus

Bholanath Sircar and others (Defendants) *Respondents:*

Baboo Obhoy Churn Bose for Appellants.

No one for Respondents.

The inclusion by the plaintiff in his notice of enhancement of land belonging to the lakheraj holding of the defendant, is no reason for dismissing his whole suit.

Morgan, J.—In this suit for enhancement of rent of 6 beegahs 3 cottahs of land, the Lower Courts find that the plaintiff has included, either through inadvertence or fraud, no less than 3 beegahs 11 cottahs and upwards of land, which is the lakheraj holding of the defendant. The Courts held that, by reason of the notice extending to this land, the plaintiff's suit in respect of the whole of the land should be dismissed. That appears to us to be no reason for dismissing the whole suit. The case must be remanded, in order that the Lower Courts may ascertain and adjudicate with regard to the plaintiff's right of enhancement in respect of the land other than the lakheraj land included in the notice.

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The 12th July 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Auction-purchaser—Ejectment—Enhancement.

Case No. 3548 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. J. W. Dalrymple, Judge of Bhaugulpore, dated the 5th June 1863, *reversing a decision of Mr. C. B. Skinner, Collector of that District, dated the 11th April* 1862.

Dabee Bhuggut and another (Defendants) *Appellants,*

versus

Beechun Raoot and another (Plaintiffs) *Respondents.*

Mr. J. Baptist for Appellants.

Baboos Banee Madhub Banerjee and *Romesh Chunder Mitter* for Respondents.

An auction-purchaser cannot eject a ryot having a right of occupancy, or enhance his rent, except in the manner prescribed by law.

Kemp, J.—THE Judge has found that the plaintiff, the ryot, has clearly proved that he has a right of occupancy.

The special appellant is an auction-purchaser. He is not entitled to eject any ryot having a right of occupancy, or to enhance the rent of such ryot otherwise than in the manner prescribed by the law in force. When the ejectment took place, Act XI of 1859 was in force, and not Act I of 1845. The defendant, if he wishes to enhance the rent hitherto paid by the plaintiff, must proceed under Act X of 1859 to enhance in a legal manner. The decision of the Judge must be affirmed, and the appeal dismissed with costs and interest.

The 13th July 1864.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement (by shareholder)—Partition—Irregularity in notice—Declaratory decree.

Case No. 3542 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. A. Swinton, Judge of Tipperah, dated the 21st September 1863, *affirming a decision of Moulvie Mahomed Kazim Khan, Deputy Collector of that District, dated the 3rd August* 1863.

Ram Lochun Dutt (Plaintiff) *Appellant,*

versus

Petumber Paul (Defendant) *Respondent.*

Baboo Poorno Chunder Mookerjee for Appellant.

No one for Respondent.

The holder of a specific share in an estate not regularly partitioned, may sue for enhancement of his share of the rent.

A slight irregularity in the drawing up of a notice of enhancement cannot affect the plaintiff's right to a declaratory order reciting his right to enhance at some future time on service of a fresh notice.

Glover, J.—THIS was a suit by a co-sharer in an estate to enhance the rent of one of the ryots holding land therein.

The Judge dismissed the case on the ground that a co-sharer in an undivided estate could not sue by himself for enhancement of a ryot's rent, and that the notice served was irregularly drawn up.

Neither of these reasons appear to us sound. The *first* objection is met by the precedents of this Court of the 12th March 1863 and the 1st April 1864, where it was held that one of several joint proprietors of an estate can maintain a suit for enhancement of his share of the rent without a butwarra. Now, in the present case, the estate, although not regularly partitioned, is separated into certain specific shares, of which special appellant holds one. There is no reason, therefore, why he should not sue for the enhancement of his share.

The *second* objection is equally untenable. There was, doubtless, a slight irregularity in the drawing up of the notice, but not, we think, sufficient to invalidate the special appellant's case. But granting that the informality were fatal, the special appellant would still have the right to a declaratory order reciting his right to enhance at some future time when a fresh notice was served.

This case must therefore be remanded to the Judge for a fresh trial with reference to the above remarks.

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The 15th July 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Notice of enhancement (on tenant in possession).

Case No. 2150 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. R. Abercrombie, Judge of Dacca, dated the 13th May 1863, reversing a decision passed by Moonshee Husmutoollah, Deputy Collector of that District, dated the 21st January 1863.

Nubo Coomar Ghose (Plaintiff) *Appellant,*

versus

Kishen Chunder Banerjee and others (Defendants) *Respondents.*

Baboos Nobo Coomar Mookerjee and *Romesh Chunder Mitter* for Appellant.

Baboo Kalee Mohun Dass for Respondents.

Where a zemindar has received rent for 22 years from the tenant in possession, notwithstanding that he is not registered in his serishta, it is upon such *recognized tenant,* and not any other party, that his notice of enhancement must be served.

Trevor, J.—PLAINTIFF issued notice on a defendant, who was registered in his seristah as his howaladar, for enhancement of rent, and now sues for rent in accordance with the notice.

The party in possession of the howala came forward, pleading that he had purchased the howala from the registered owner; that rents had been received from him for years by the zemindar's naibs; and that, consequently, the notice should have been served on him; and not having been so served, the suit should be dismissed.

The first Court gave plaintiff a decree against the defendant in possession. The Judge dismissed the suit, inasmuch as the zemindar having received rents from the defendant in possession, the purchaser was bound to issue notice on him; and not having done so, the suit cannot be maintained.

Plaintiff now appeals specially, urging that he is only bound to look to the registered tenant; and having issued notice on him, that is sufficient to warrant a decree against the party in possession.

The contention of the zemindar will not hold water. It is no doubt true that the zemindar need in the first place look only to the registered tenant; but if the zemindar, as has been found to be the fact by the Judge, received rent for 22 years from a tenant, notwithstanding that he is not registered, it is upon such *recognized tenant,* and not on any other party, that the notice of enhancement must be served. Under this view we see no ground for interfering in special appeal, but reject the application with costs.

The 18th July 1864.

Present:

The Hon'ble W. Morgan and Sumboonath Pundit, *Judges.*

Suit for rent—Plea of payment—Set-off.

Case No. 587 of 1863 under Act X of 1859.

Regular Appeal from a decision passed by the Moonsiff of Durbhunga, in Tirhoot, vested with the powers of a Deputy Collector, dated the 8th August 1862.

Mussamut Joykooer (Defendant) *Appellant,*

versus

Mr. J. Furlong, General Manager for the Maharaja of Durbhunga (Plaintiff) *Respondent.*

Baboos Kissen Kishore Ghose and *Olkoy Churn Bose* for Appellant.

Baboo Juggadanund Mookerjee for Respondent.

Payment by a tenant under the landlord's directions, to another or for a specified purpose, of a sum equivalent to the amount c aimed as rent, is tantamount to a payment to the landlord himself, and is a sufficient answer to the landlord's suit for rent. Such a defence, being rather one of payment than set-off, is open to a defendant in a suit under Act X of 1859.

Morgan, J.—THE issues which we directed in this case have been returned with the finding of the Lower Court in favor of the appellant. The Court finds (and as it appears to us on sufficient evidence) that there was an agreement between the Maharaja and his tenant, the deceased Mohun Loll Dobee, whereby the latter was authorized to apply the sums due from him to the Maharaja for rent, in payment of disbursements made by him on account of law-suits carried on for the Maharaja. The Court has found that the amount of such disbursements exceeded the amount due to the Maharaja for rent; but beyond this, the Court states that it has not been able to ascertain the precise amount disbursed.

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As it is clear that the tenant has paid, if not direct to the Maharaja, yet on account of the Maharaja by his directions, a sum equivalent to the amount of rent claimed, it seems to us that that is a sufficient answer to the present suit. It amounts to a plea of payment.

Some question was made as to whether a defence of this kind was open to the defendant in a suit brought under Act X of 1859, and a case was cited (decided in 1861, and reported at page 147 of the Volume of Decisions of that year) in which it is laid down that a defence by way of set-off is not open to a defendant in a suit before the Collector under Act X. In the present case the defence relied on is rather payment than set-off. Payment by the Maharaja's directions to another or for a specified purpose, is equivalent to a payment to the Maharaja himself, and we think that it cannot be contended that, in such a suit, the defence of payment is not open to the defendant, whatever may be the law respecting the admissibility of a set-off by way of defence in a suit under Act X of 1859.

We shall adopt the finding of the Lower Court. The result will be that the plaintiff's suit for rent must be dismissed, and reversing the judgment of the Lower Court, this appeal allowed with costs.

The 19th July 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Section 14 Act XIV of 1859 inapplicable to suits under Act X of 1859.

Case No. 121 of 1864 under Act X of 1859.

Regular Appeal from a decision passed by Mr. E. C. Craster, Collector of Howrah, dated the 3rd December 1863.

Soudamonee Dossee (Plaintiff) *Appellant,*

versus

Poorno Chunder Roy and others (Defendants) *Respondents.*

Baboos Bhoyrub Chunder Bannerjee and *Otool Chunder Mookerjee* for Appellant.

Baboos Dwarkanath Mitter and *Mohesh Chunder Chowdhry* for Respondents.

Section 14 Act XIV of 1859 is not applicable to suits barred by limitation under Act X of 1859, which are expressly exempted from the operation of Act XIV by Section 3.

Kemp, J.—This is a suit to recover possession of 10 beeghas of land from which it is alleged the plaintiff was illegally ejected by the party entitled to receive the rent thereof, and is brought under the provisions of Clause 6 Section 23 Act X of 1859.

The cause of action admittedly accrued in 1260 B. S. The suit is brought in 1863 or 1270 B. S. The latest date upon which this suit could have been brought so as to escape limitation was the 30th July 1861. (*See* Section 30 of Act X of 1859 and Act LIII of 1860.)

The appellant claims the benefit of Section 14 Act XIV of 1859, inasmuch as she says that she prosecuted her claim in good faith though in the wrong Court. But she is not entitled to any deduction under that Section, inasmuch as its provisions are not applicable to suits of this description which are expressly exempted from the operation of Act XIV of 1859 by Section 3 of the said Act. (*See* decisions of this Court in special appeal No. 2040 of 1863, dated the 17th February 1864, and No. 656, August 1863.)

The appeal is therefore dismissed with costs and interest.

The 19th July 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Enhancement—Jungleeboory lands.

Case No. 1969 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. R. H. Russell, Judge of Midnapore, dated the 29th April 1863, *modifying a decision passed by Baboo Mohesh Chunder Roy, Moonsiff, exercising the powers of a Deputy Collector of that District, dated the 9th March* 1863.

Deen Dyal Agustee (Defendant) *Appellant,*

versus

Messrs. Robert Watson and Co. (Plaintiffs) *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Mr. R. T. Allan for Respondents.

In fixing the rent to be paid for cultivated land originally held on a jungleeboory grant, the Court should ascertain the rate payable by the same class of ryots for lands of a similar description and with similar advantages.

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Trevor, J.—PLAINTIFFS sued for arrears of rent at an enhanced rate after notice served. The right to enhance was not very clearly disputed by the defendants, but they strongly demurred both to the area of land which plaintiffs alleged to be in their possession, and also to the rate of rent which plaintiffs claim.

The Deputy Collector first sent an Ameen into the Mofussil for the purpose of holding a local investigation; but as the defendant was dissatisfied with the Ameen's proceeding, the Deputy Collector then proceeded himself into the Mofussil, and the result of the enquiry was that defendants held 321-16-2 beegahs of land; that of this, 1-18-4 beegah is unculturable jungle land, and 99-6-6 beegahs are beyond the boundaries set forth in the notice served upon the defendants; that, consequently, only 220-11-14 beegahs of land are in defendants' possession, for which they are liable to pay rents. As to the rates, the Deputy Collector was of opinion that the lands of the village in which the land in dispute is situated, *viz.* Sarsabandee, are not of a better description, as seems to have been the opinion of the Ameen, but of the same description as those of Chunderbeela; that the culturable lands of Chunderbeela have, by a decision of the Principal Sudder Ameen, been fixed at 8 annas a beegah, and the jungle lands at 4 annas; that, consequently, about the same rates should be fixed for the some sort of lands in Sarsabandee. He therefore assessed 151-14-14 beegahs at Rs. 85-5-10 at the rate of 9 annas per beegah as cultivated land, and 69-17-4 beegahs as jungle land at Rs. 17-3-10, being at the rate of 4 annas per beegah. Costs in proportion to the amount decreed and dismissed.

On appeal by the plaintiff, the Judge assented to the area fixed by the Lower Court. As to the rates, the Judge remarks that the Ameen, who went to the land when the crops were on the ground, found that the lands of Sarsabandee are much superior to those of Chunderbeela. The Moonsiff, Deputy Collector, who went when the crops were off the ground. considered they were of the same quality. He finds the rates fixed by the Ameen in the adjoining village Panasole to be less than those in Sarsabandee. The rates found by the Ameen were less, but in that case, on appeal, one rupee was fixed as the rate for lands in cultivation, it being shown that that was the rate paid for the land held under the old pottah which was considered to be still in force. The evidence would tend to show that in other villages in the neighbourhood, a higher rate than this prevails for the best lands. The evidence is not so conclusive on the part of the plaintiff as could be wished, but one rupee may be considered a fair average rate, and this is the rate which was assumed as the full rate in the original pottah. The Judge, therefore, fixed one rupee on the cultivated and 4 annas on the uncultivated lands, and modified the first Court's decision accordingly, with costs in proportion to the amount decreed and dismissed.

The defendants below have now appealed specially, urging that the pottah was originally a jungleboore-tenure, and, consequently, the Judge, when considering the rate of rent to be paid by them, should have taken into consideration, with reference to Clause 2, Section 17 of Act X of 1859, the expense to which they had been put in clearing the land originally; and 2nd, that the Judge should have, in fixing the rate of rent, considered, as did the Moonsiff, Deputy Collector, what was the prevailing rate payable by the same class of ryots with themselves for lands of a similar description and with similar advantages in the places adjacent, and not have fixed the rate with reference to a sum mentioned in the old pottah which had never been acted up to.

The cultivated land was originally held on a jungleboore grant, but it has been cleared for more than 30 years, so that at the present day the rate of rent demanded must be determined by the customary rate for similar lands with similar advantages payable by the same class of ryots in places adjacent. This enquiry the first Court made with considerable care. The Judge, however, looking simply to the sum of one rupee mentioned in an old pottah which was never acted on, for in both of the old pottahs, both that of 1228 and that of 1251, taking remission into consideration, 8 annas was the rent paid upon the cultivated land, fixed the rate at one rupee. But even had there been no error in the Judge's calculation, the mode of enquiry entered into by him was not that enjoined by the old Regulations of Government and re-enacted by Section 17 of Act X; and that mode is, as above observed, the ascertainment as to what was the rate payable by the same class of ryots for lands of similar description and with similar advantages in the places adjacent: if what the defendants pay as rent is below this, it should be raised to it, but not beyond it.

We, therefore, remit the case to the Judge with directions that he will carefully make

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this necessary enquiry, looking simply and solely to the evidence on the point on the record, and pass eventually whatever order seems to him to be just and proper.

The 19th July 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Estoppel—Kubooleut—Pottah.

Case No. 2877 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. R. H. Russell, Judge of Midnapore, dated the 14th August 1863, affirming a decision of Mr. A Rattray, Deputy Collector of that District, dated the 14th April 1863.

Syud Mahomed Hossein (Plaintiff) *Appellant,*

versus

Peeroo Mullick and others (Defendants) *Respondents.*

Messrs. R. T. Allan and *R. E. Twidale* for Appellant.

Mr. C. Gregory for Respondents.

A ryot is estopped from pleading, in a suit for a kubooleut and for determination of the rate at which such kubooleut is to be delivered, a pottah which he denied in a former suit for rent.

Kemp, J.—This was a suit brought under the provisions of Clause 1 Section 23 of Act X of 1859, for a kubooleut and for determination of the rate at which such kubooleut is to be delivered. The Judge dismissed the suit.

The plaintiff below is the appellant. He is the purchaser of the rights and interests of the putneedar in execution of a decree. It appears that, while the putnee was under attachment under the provisions of Regulation II. of 1806, the former putneedar's widow created a durputnee and granted pottahs to the ryots and amongst them to the defendant, special respondent. When the plaintiff acquired his title, he took ikrars from the tenantry to pay rent as heretofore, but these ikrars in no way confirmed the rate of rent. A suit was brought against the defendant for rent, and the ikrar was pleaded. The defendant answered that he was not the tenant of the plaintiff, and that he had executed no kubooleut and received no pottah. To establish the relation of landlord and tenant, the plaintiff filed the kubooleut given by the defendant to the durputneedar and obtained a decree, not on the ikrar which was not adequately stamped, nor on the kubooleut, but upon jummah-wasil-bakees.

In the present suit the defendant sets up the pottah which he had distinctly denied in the rent suit, and the Judge holds that he is not estopped from pleading it, inasmuch as the plaintiff condoned the fraud committed by the defendant by filing the kubooleut, which is tantamount to admitting the pottah.

We cannot concur in this view of the case. The kubooleut was not filed in admission of the pottah, but simply to prove that the relation of landlord and tenant existed between the plaintiff and defendant. The plaintiff is not bound by that kubooleut. The case is therefore remanded for trial under the provisions of Clause 1 Section 23 Act X of 1859. It will involve a determination of the rate at which the kubooleut is to be delivered. Costs to follow the result.

The 19th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Rent—Acquiescence — Tenants holding without agreement.

Case No. 2325 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. W. T. Tucker, Officiating Additional Judge of Sarun, dated the 23rd May 1863, affirming a decision of Baboo Gocool Chunder Chowdry, Deputy Collector of that District, dated the 26th November 1862.

Messrs. John Stalkart and James Cox (Defendants) *Appellants,*

versus

Lallah Bhurrut Lall for Baboo Deonarain Singh (Plaintiff) *Respondent.*

Mr. T. T. Forbes for Appellants.

Baboo Kalee Kissen Sein for Respondent.

The sending of an agent by a tenant to settle with the landlord as to the rent, is not a virtual acquiescence in the rate of rent demanded.

A tenant who holds without an agreement is only liable to a fair rent.

Jackson, J.—This was a suit for arrears of rent. The landlord allowed the tenant to hold the jumma without any formal agreement. In the course of the year he wrote to the tenant that the rent would be rupees 9-6 and rupees 9-10 per

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beegah. The tenant replied that he was sending his agent to come to terms with the landlord as to the rent. The landlord and the agent met, but could not agree to the terms. The landlord now sues for the rate of rent which he originally demanded. The tenant alleges that it is an excessive and unreasonable rent. Both the Lower Courts have decreed the claim on the ground that the sending the agent to settle the rent was virtual acquiescence in the rate demanded.

On special appeal the tenant objects to this construction being put upon the letter which he wrote. We have heard the letter read. By it the tenant does not anywhere agree to the rate demanded. The letter closes by a request for favourable consideration, which looks as if an abatement was expected. The agent deposes that he and the landlord could not come to terms because of the excessive nature of the demand. There is nothing in this evidence to support any agreement to pay the rate demanded; on the contrary, the evidence proves that the rate was contested.

It is then said that the tenant having held the land without an agreement, must pay what is demanded. But we think he is liable only to a fair demand. The landlord allowed him to hold without agreement, and, under such circumstances, the Court should decree a fair rent.

The Lower Court's judgment is reversed and the case remanded for proper enquiry as to what is a fair rate of rent and decree at that rate for the extent of land found in the tenant's possession, there appearing to be a dispute on this point also, which was not settled. Remanded accordingly.

The 20th July 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Kubooleut—Jurisdiction — Boundary dispute—Procedure.

Case No. 2234 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 14th of May 1863, reversing a decision of the Deputy Collector of that District, dated the 28th December 1861.

Bebee Amina and others (Plaintiffs) *Appellants*

versus

Sheikh Ramzan Ali and others (Defendants) *Respondents.*

Mr. J. Baptist for Appellants.

Mr. G. C. Paul for Respondents.

A landlord cannot sue for a kubooleut for past years. The Revenue Courts have no jurisdiction to decide a boundary question between two estates. A landlord must first obtain a declaration in the Civil Court that the land in dispute is within the limits of his estate, after which he may proceed to assess revenue upon it in the usual course under Act X of 1859.

Campbell, J.—It is quite clear that plaintiff could not sue for a kubooleut for past years. And even if we were to regard the suit as in substance brought to realize rent for use and occupation, still as we find that in truth the matter involved is a boundary dispute—that both defendant and the intervenor owner of the adjoining estate assert that the land belongs to this latter estate—and it is clear that plaintiff had not hitherto realized rent from this land, we think that the Revenue Courts had no jurisdiction to decide the boundary question between the two estates. In such cases, the jurisdiction is only given by Section 77 of Act X of 1859, when it is found that either party had hitherto received the rent. Plaintiff must therefore by suit in the Civil Court obtain a declaration that the land in dispute is within the limits of his estate, after which, if so found, he may proceed to assert a right to assess revenue upon it in the usual course under Act X.

The appeal is dismissed with costs.

The 21st July 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Limitation — Act XIV of 1859 inapplicable to suits under Act X of 1859.

Case No. 2334 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 4th of June 1863, reversing a decision of the Collector of that District, dated the 30th December 1862.

Sreemutty Dabee (Defendant) *Appellant,*

versus

Nukeesunnissa Bebee and others (Plaintiffs) *Respondents.*

Baboos Chunder Madhub Ghose and *Mohesh Chunder Chowdhry* for Appellant.

Messrs. C. Gregory and *J. Baptist* and *Moonshee Ameer Ali* for Respondents.

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In cases where the special rules of limitation prescribed by Act X of 1859 apply, the provisions of Act XIV of 1859 have no application whatever.

Campbell, J.—THIS was a suit under Act X of 1859 to recover possession of land from which plaintiff alleged that he had been dispossessed in 1854. The suit was brought on 11th December 1862, and is out of time under the provisions of Section 30 Act X of 1859, and Act LIII of 1860.

Respondent urges that he is entitled to the benefit of Section 14 Act XIV of 1859, and is entitled to deduct time during which his suit was pending in a wrong Court, and that he may apply such deduction in such a way as to take date as if he had brought his action under the old law.

But it seems to us clear that, as already held in the decisions noted in the margin, in cases where the special rules of limitation provided by Act X apply, the provisions of Act XIV of 1859 have no application whatever. This case is undoubtedly governed by the provisions of Act X of 1859, and that being so plaintiff cannot claim the benefit of certain provisions of Act XIV of 1859, even if they would, in this instance, be of any avail to bring his case within time.

Special Appeal 2040 of 1863, decided 17th February 1864.
Special Appeal 656 of 1863, decided August 1863.
Regular Appeal 121 of 1864, decided July 19, 1864.
Special Appeal 2273 of 1863, decided July 21, 1864.

We, therefore, reverse the decision of the Judge, and decreeing the appeal, dismiss plaintiff's claim.

The 21st July 1864.

Present:

The Hon'ble E. P. Levinge and F. A. Glover, *Judges.*

Mokururee holding — Farming lease.

Case No. 3557 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 19th of August 1863, affirming a decision of the Deputy Collector of that District, dated the 22nd November 1862.

Dhurm Roy and others (Defendants) *Appellants,*

versus

Muddoosoodun Prosad Chowdhry (Plaintiff) *Respondent.*

Baboo Roopnath Banerjee for Appellants.
No one for Respondent.

A mokururee holding cannot be extinguished by a subsequent farming lease.

Glover, J.—SPECIAL respondent in this case sued to recover possession of certain lands, from which he alleged himself to have been dispossessed by the zemindar. He claimed to hold on a mokururee pottah.

The defendant (special appellant) objected that this pottah had never been given, but that the special respondent, in connection with one Kadernath Chowbee, held the land on a farming lease, on the expiry of which special respondent continued in occupation as a simple cultivating ryot.

Both Lower Courts found that the mokururee lease was genuine. The Deputy Collector held, moreover, that the "ijara" was fictitious; but in this he was overruled by the Judge, who on this point found for the special appellant. He decided, however, that the mokururee title of the special respondent could not be, and was not, extinguished by a subsequent farming lease, and therefore dismissed the appeal and restored the plaintiff to possession.

It is urged before us in special appeal that, supposing the special respondent's mokururee rights to have ever existed, they were surrendered and avoided by the execution of the ijara lease.

We think that the Judge has gone on very insufficient grounds in that part of his decision which declares the validity of the farming lease. He has reversed the judgment of the Deputy Collector on this head, simply on the ground that, although special respondent's name is not mentioned in that lease as farmer, yet he is proved to have been in partnership therein with Kadernath, because both were sued under the lease for rent, and both cast in that suit. This by itself, and without seeing how and for what reasons that suit was decided is not, we think, a sufficient ground. The judgment might have been *ex-parte*, and the mokururedar there sued might not have been the one now before us. At any rate, Muddoosoodun's name not being in the lease, we do not think the fact of a man of the same name being sued under it, is sufficient to prove the allegation that he gave up his mokururee title, and took in lieu a mere farming one.

But be this as it may, we hold that a superior title like a mokururee holding cannot be extinguished by an inferior one like an ijara. The two things are in short

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incompatible, and it is impossible to believe, without some other evidence, that a man possessed of the one would give it up in exchange for the other.

We think, therefore, that the Judge had no sufficient warrant for his finding that the ijara lease was given to special respondent. We also think that the mokururee right could not be extinguished by a farming lease, even supposing the latter to have been executed.

We dismiss this special appeal.

The 21st July 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Enhancement (by purchaser of moiety of estate settled in perpetuity).

Case No. 2372 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. H. S. Thompson, Judge of Backergunge, dated the 3rd June 1863, *reversing a decision passed by Baboo Ram Chunder Paul, Deputy Collector of that District, dated the 22nd September* 1862.

Ram Lochun Paul (Plaintiff) *Appellant,*

versus

Mussamut Brojo Mohinee and others (Defendants) *Respondents.*

Baboos Hem Chunder Banerjee and *Kalee Mohun Dose* for Appellant.

No one for Respondents.

Where the purchaser of a moiety of an estate settled in perpetuity some years ago according to a jummabundee then made, does not sue directly to set aside the jummabundee of settlement, but many years after the settlement, to enhance the rents entered therein, he is, to entitle him to succeed, bound to show that, since the period of settlement, circumstances have occurred which have tended to raise the value of the ryots' lands, and consequently to entitle him to an increased share of the surplus profits arising from the lands.

Trevor, J.—PLAINTIFF, who is the purchaser of 8 annas of an estate which was settled in perpetuity some years ago according to a jummabundee then made, now sues to enhance the rent of the defendant.

Defendant pleads that his rent was fixed in the jummabundee of settlement, and that plaintiff, who stands in the room of the party with whom the original settlement was made, cannot enhance his rent.

The Lower Appellate Court held that, as the rates assessed on these tenants were fixed after due enquiry, plaintiff, who stands in the place of the original party to the settlement, is bound by the jummabundee of settlement. It found also that the case of Jogendur Chunder Bose *versus* Tara Chand Bose was inapplicable to the circumstances of the present case.

Plaintiff now appeals specially, urging that, as he was not bound under all circumstances to observe the rent roll of settlement, he is entitled to raise the rent of the tenantry on showing that the rate entered in the jummabundee is below the pergunnah rate. We think, as laid down in the case above cited, that, as the plaintiff does not sue directly to set aside the jummabundee of settlement, but, many years after the settlement, to enhance the rents entered therein, he is, to entitle him to succeed, bound to show that, since the period of the settlement, circumstances have occurred which have tended to raise the value of the ryots' lands, and, consequently, to entitle him to an increased share of the surplus profits accruing from the lands. If he can show this, he is entitled to what he claims, but not otherwise. We remit the case to the Lower Appellate Court for re-investigation with reference to the above remarks.

The 21st July 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Notice of enhancement.

Case No. 2472 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. E. G. Birch, Officiating Additional Judge of East Burdwan, dated the 16th March 1863, *affirming a decision of Mr. H. W. Mackenzie, Deputy Collector of that District, dated the 10th November* 1862.

Tarachand Roy (Plaintiff) *Appellant,*

versus

Keenaram Kurmokar and others (Defendants) *Respondents.*

Baboos Greeja Sunker Muzoomdar and *Chunder Madhub Ghose* for Appellant.

Baboo Kissen Succa Mookerjee for Respondents.

A notice of enhancement must be reasonably accurate and precise. A notice to pay a lump sum on the whole land in and out of defendant's possession is not sufficient.

Campbell, J.—WE think it is found as a fact that the land on which enhanced rent is claimed, or the greater part thereof, is not in possession of the defendant, and that a notice

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to pay a lump sum on the whole land in and out of defendant's possession is not sufficient. We consider that the Judge is right that notices must be reasonably accurate and precise, and that on this notice the enhanced rent cannot be claimed. We dismiss the appeal with costs.

The 21st July 1864.

Present :

The Hon'ble E P. Levinge and F. A. Glover, *Judges.*

Resumption of lakheraj land—Proof of title—Local enquiry.

Case No. 3558 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 23rd September 1863, affirming a decision of the Moonsiff of Serampore, dated the 22nd December 1862.

Baboo Rajkissen Mookerjee and others (Plaintiffs) *Appellants,*

versus

Baboo Joykissen Mookerjee and others (Defendants) *Respondents.*

Baboos Bama Churn Bannerjee and *Prosunno Coomar Sen* for Appellants.

Baboo Motee Lall Mookerjee for Respondents.

Where a plaintiff sues as zemindar to resume and assess land as his lakheraj land, he is bound to give some evidence of his title to the land before the C urt can be warranted in ordering a local enquiry.

Levinge. J.—THE plaintiff sued to resume and assess the land in plaint mentioned held by one of the principal defendants as his alleged lakheraj land. This defendant pleaded that it was his valid lakheraj land. Other defendants, zemindars, pleaded that the land sued for lay within their shares and did not appertain to the plaintiff's share. Both Courts rightly threw the *onus* on the plaintiff to prove, as a condition precedent, that the land sued for fell within the plaintiff's share, and both Courts have dismissed his suit, he having failed to give *any evidence* whatever to prove that it lies within his share.

On special appeal it is urged that it was the duty of the Lower Appellate Court to have directed a local enquiry to ascertain if the land fell within the plaintiff's share. We are of opinion that, as the plaintiff brought his suit on his right as zemindar of the land, he was bound to give some evidence of his title to this property in dispute before the Court could be warranted in ordering any local enquiry. Further, we see that the only evidence he did produce was a chitta which contained no boundaries. Consequently, a local enquiry to see if this alleged lakheraj land was in plaintiff's share *quoad* that chitta would have been of no use, and therefore the Court was right, in this instance and under the circumstances of the case, (no witnesses having been produced by the plaintiff), in not directing an enquiry and in dismissing the suit against the lakherajdar. Appeal dismissed with costs.

The 21st July 1864.

Present :

The Hon'ble J. P. Norman, *Offg. Chief Justice,* and the Hon'ble C. Steer, *Judge.*

Rent—Bond—Kubooleut—Set-off.

Case No. 668 of 1864 under Act X. of 1859.

Special Appeal from a decision passed by Mr. A. W. Russell, Officiating Judge of Behar, dated the 10th February 1864, affirming a decision of Mr W. J. Longmore, Collector of that District, dated the 23rd November 1861.

Mussamut Edun (Plaintiff) *Appellant,*

versus

Mussamut Bechun (Defendant) *Respondent.*

Mr. R. T. Allan and *Moonshee Abbas Ali Khan* for Appellant

Mr. C. Gregory for Respondent.

A tumussook, in modification of a lease, if genuine, constitutes an answer as far as it goes to a claim for rent and is not merely a set-off A suit for rent on a kubooleut for 3,500 rupees superseded by a tumussook under which 676 rupees was claimable, and to the payment of which, if it had been rightly put on the tumussook, the defendant would not probably have offered any objection, was held to have been properly dismissed.

Steer, J.—THIS is a suit for the rents of a farm for the years 1267 and 1268, and the case came in special appeal before this Court on the 1st April 1863. On that occasion the Court ordered a remand, in order that it might be decided whether a certain tumussook, by which it was alleged that the original agreement had been varied as to the rent, was genuine or not. The Lower Court has now decided that the deed is genuine, and that, in accordance with the conditions contained in it, no rent is due for the years 1267 and 1268, for which years the arrears are claimed.

In special appeal it is contended that the debt upon the tumussook cannot be pleaded

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as a set-off in a suit for rent; and secondly, that, if the sum stipulated to be paid under the tumussook can be taken at all in discharge of the rents, the whole cannot be so taken, as the tumussook stipulates that Rs. 676 is to be paid every year to the lessor, the plaintiff, to enable her to pay the Government revenue and other expenses, and the residue of the rent only is to be applied towards the debt under the tumussook.

In regard to the *first* objection, it was raised before and overruled. It was then remarked "that the tumussook, if genuine, constituted an answer to a large portion of the rent, and did not constitute merely a set-off." The tumussook is not an ordinary money bond, but a deed in modification of the conditions of the original deed of lease.

With regard to the *second* objection, there is no doubt that Rs. 676 is yearly payable to the plaintiff as rent. The tumussook provides clearly that, deducting that sum, the lessee is to be allowed to carry the rest of the rent stipulated for to the credit of the loan. But still we think the suit has been rightly dismissed. The plaintiff sued on a kubooleut for Rs. 3,500 which has been superseded by the tumussook. The plaintiff has chosen to harass the defendant with a suit for rent on a superseded deed for the sum of Rs. 3,500, when Rs. 676 was only claimable, and to the payment of which, if it had been rightly put on the tumussook, the defendant would not probably have offered any objection. We therefore uphold the order dismissing the suit, and we dismiss the special appeal with costs. We declare the plaintiff entitled to the yearly rent of Rs. 676, which, if not paid on demand, he can proceed to enforce in due course of law.

The 21st July 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Limitation — Section 32 Act X of 1859—Section 14 Act XIV of 1859.

Special Appeals from a decision passed by Mr. H. S. Thompson, Additional Judge of Backergunge, dated the 20th May 1863, *reversing a decision passed by Baboo Judoonath Chatterjee, Officiating Moonsiff, with powers of the Deputy Collector of that District, dated the 8th January* 1863.

Case No. 2273 of 1863 under Act X of 1859.

Poorneema Chowdhrain (Plaintiff) *Appellant,*

versus

Raj Chunder Roy (Defendant) *Respondent.*

Baboo Kalee Mohun Doss for Appellant.

Baboos Dwarkanath Mitter and *Unnodapershad Banerjee* for Respondent.

Case No. 2349 of 1863 under Act X of 1859.

Juggurnath Roy Chowdhry and others (Plaintiffs) *Appellants,*

versus

Raj Chunder Roy (Defendant) *Respondent.*

Baboo Sreenath Doss for Appellants.

Baboos Dwarkanath Mitter and *Unnodapershad Banerjee* for Respondent.

In a suit governed by the limitation prescribed by Section 32 Act X of 1859, a plaintiff is entitled to no diminution of time on account of the period during which the suit was pending in a Court without jurisdiction as provided by Section 14 Act XIV of 1859.

Trevor, J.—PLAINTIFFS in two cases sue the defendants, who are the owners severally of an 8½ and 7½ annas share of an under-tenure in their estate, for a balance of the rents due from 1257 to 1267, or from 1850 to 1860. They admit the payment by defendants of Rs. 464 yearly, but allege that the rent due from the defendants is Rs. 542. They sue for the difference between these two sums.

The defendants plead—1*st* that plaintiff is out of Court under the Statute of Limitation; and, 2*nd*, that they have paid an unvarying sum for 15 years to plaintiff under a written agreement, that, in consequence of diluvion, that should be the precise rent.

The Lower Appellate Court considered that under Section 14 of Act XIV of 1859, plaintiff's claim can only be listened to from 1265 to 1267. On the merits, he was of opinion that the payment by defendants of the same amount of rent for 15 years was sufficient to admit of the presumption that an arrangement had been entered into that the sum paid should be the amount of the putnee.

Plaintiff now appeals specially, urging that, as he sued under Section 32 of Act X of 1859, no portion of his claim is affected by the Statute of Limitation; that, under that law, he is entitled to a deduction of the period of 7 months, during which his suit was pending before the Civil Court, who had no jurisdiction, and he will then be within time; and 2ndly that the Lower Appellate Court was not justified in presuming any verbal arrangement for the abatement of defendants' rent.

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simply in consequence of the fact of their having paid that sum for 15 years.

The present suit, as is admitted by plaintiff, is regulated by the terms of Section 32 of Act X of 1859; and under that Section, plaintiff is entitled to no diminution of time on account of the period during which the suit was pending in a Court without jurisdiction; and as his present suit is not brought within 3 years from the passing of Act X of 1859, he is out of Court. We cannot import from another law a provision and insert it in a Section of an Act in which it does not exist, merely from some notion of equity, or in order to avoid what may appear a hard case. But we must interpret the law strictly as it stands, leaving to the Legislature, whose province it is, the duty of supplying its own omissions, if they are such, as has been contended before us. Under this view we think plaintiff clearly out of Court.

On the merits we may add, though it is unnecessary, that we think that the Lower Appellate Court was perfectly justified in presuming from the payment, without protest or demand ever made for higher rent, of 15 years evidenced by the dakhilahs produced by defendants, that an oral agreement that such was to be the fixed rent had been entered into between the parties.

We reject the special appeal with costs.

The 22nd July 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Jurisdiction — Putnee — Abatement— Interest (before decree).

Case No. 3572 of 1863.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 6th of October 1863, reversing a decision of the Moonsiff of that District, dated the 22nd March 1863.

Protabnarain Singh (Defendant) *Appellant,*

versus

Nityeram Singh (Plaintiff) *Respondent.*

Baboos Kishen Kishore Ghose and *Nobo Kishen Mookerjee* for Appellant.

Baboo Sreenath Doss for Respondent.

Suit for abatement of rent in respect of a portion of a putnee tenure taken by Government for railway purposes, from the time when the land was so taken down to the period of his relinquishing the lease. As the land was taken, the rent paid, and the putnee resigned before Act X of 1859, that Act was held not to apply to the case.

Levinge, J.—The plaintiff brought his suit in the Civil Court, stating that he had acquired a putnee tenure under the defendant in the year 1254, and that he remained in possession until the end of 1265, and relinquished his holding in 1266; that when in possession as putneedar a portion of his land, *viz.*, 86 beegahs 17 cottahs 9 chittacks, representing the annual profit of Rs. 108-8 had been taken by the Government for railway purposes, yet the defendant had not given him credit for the rent of the land so taken from him but compelled him, on proceedings taken under Regulation VIII of 1819, to pay his annual rents without any abatement; and therefore he now sued to establish his right to abatement and to recover back the annual sum of Rs. 108-8 paid by him from the time the land was so taken down to the period of his resigning his putnee.

Such is the outline of the plaintiff's case. The defendant has made several defences; but both the Lower Courts have decided in the plaintiff's favor. The first Court declared the plaintiff's right to an abatement, which was clearly established, and decreed that the plaintiff was entitled to recover from the defendant the rent for six years from 1260 to, and inclusive of, 1265, at the rate of Rs. 108-8, but disallowed the plaintiff's claim for interest (Rs. 350-8-3) as the principal sum had never been ascertained. The Lower Appellate Court, not only upheld the decree for the rent, but awarded the interest claimed.

On this special appeal it is first contended by the defendant, the special appellant, that this suit will not lie in the Civil Court, but should have been brought in the Collector's Court under Act X of 1859. But we are of opinion that the provisions of that law do not apply to this case, as the land was taken, the rent was paid, and the putnee had been resigned, before that Act came into operation.

Next, it is urged that, inasmuch as there had been a decree of a Civil Court for a portion of the rent, so much as is covered by that decree cannot now be recouped, as the claim to an abatement or deduction should have been made in that suit. But we find from the decree that it was passed without prejudice to the then defendant, the now plaintiff and putneedar, proceeding in a regular suit to establish his right to an abatement,

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and to recover this sum decreed as rent. It was not open to the Court under the then system of pleadings to have admitted the defendant's claim as a set-off in answer to the action. We therefore overrule this objection.

But we think the appellant's contention that he ought not to be fixed with interest on these sums before decree to be just, the principal sums never having been ascertained before the decree in this cause; and we therefore reverse that part of the order of the Lower Appellate Court.

It has been urged by the appellant's pleader that the rent of Rs. 108-8 is not the rent that ought to be abated, as that sum represents the gross profits of so much of the land as was taken, and not the rent; but we find that this objection is not taken as one of the grounds of appeal to this Court, and we therefore decline to let the appellant open that matter.

The decree of the first Court will stand. and the parties will pay costs of appeal in proportion to the amount decreed and remitted.

The 22nd July 1864.

Present:

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Jurisdiction (of Civil Court)—Suit to set aside sale in execution of decree for rent.

Case No. 3566 of 1863.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 23rd September 1863, *affirming a decision passed by Mr. W. Wright, Principal Sudder Ameen of that District, dated the 14th March* 1863.

Haranund Dutt and others (Defendants) *Appellants,*

versus

Ram Dhun Sein (Plaintiff) *Respondent.*

Baboo Sreenath Dass for Appellants.

Baboos Bungshee Dhur Sein and *Greeja Sunkur Muzoomdar* for Respondent.

A Civil Court has no jurisdiction to entertain a suit to set aside a sale, by order of a Collector under Act X of 1859, in execution of a decree for arrears of rent due on the tenure of which the sale was made.

Levinge, J.—This was a suit to set aside a sale by order of the Collector under Act X of 1859, in execution of a decree for arrears of rent due on the tenure of which the sale was made.

The holding was a jote tenure admittedly transferable. This suit was based on the illegality of the sale, not on any irregularity in conducting it. The plaintiff, who is the defaulting tenant and judgment-debtor, alleged that the sale was void as he had no notice of the decree which was taken *ex-parte*, and that this being a decree coming within the provisions of Section 108 of Act X of 1859, execution should first have issued against the judgment-debtor's moveable property. Both the Lower Courts have decreed the plaintiff's suit.

On special appeal, it is urged by the defendants that the Civil Court has no power to entertain this action, inasmuch as the order of the Collector directing sale in execution of the decree is final under the provisions of Section 151 of Act X.

We are of opinion that the objection taken must prevail. We think that, under the terms of that Section, the order cannot be revised or interfered with, or anything done under that order by the Civil Court in a suit. And this opinion is in conformity with the view taken by the Court in a decision passed on the 16th March 1864, and reported at page 150 of the Revenue, Judicial, and Police Journal, and therefore, we must allow this appeal with costs and decree the dismissal of the suit.

We may add that, if the order is not final, that is to say, if there is still something to be done under that order, the Collector has still jurisdiction over his order. We only add this remark, as the pleader for the respondent seems to think that it has not yet been completely carried out, but if it has not, such a fact would also be a ground for dismissing this suit.

The 25th July 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Rent — Plea of less land than described in Pottah.

Case No. 21 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. R. Cockerell, Additional Judge of Nuddea, dated the 29th September 1863, *reversing a decision passed by Baboo Doorga Dass Chowdhry, Deputy Collector of Bongong, dated the 15th July* 1863.

Mr. H. D. Tripp (Plaintiff) *Appellant,*

versus

Kalee Doss Mookerjee (Defendant) *Respondent.*

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Mr. A. F. Lingham for Appellant.

Baboo Prosunno Coomar Bose for Respondent.

A ryot is bound to pay the amount of rent which he has agreed to pay. The plea of the quantity of land being less than that mentioned in the pottah cannot avail him.

Morgan, J.—THIS is a suit by a zemindar to recover rent from his ryot. The defence is that the quantity of land of which the ryot has obtained possession, is not so large as the quantity described in the pottah and kubooleut. The land itself consisted of several old holdings, some of which had been abandoned by the former occupiers, and one of which had previously been in the occupation of this defendant. The description of quantity in the kubooleut purports to be taken from other old measurement papers. It is probable that the land itself, the subject of the lease, must have been known to the defendant. Under these circumstances, we think that it would be no defence to this suit for rent even if the defendant could succeed in establishing that the quantity of land is in fact not so great as the quantity mentioned in the kubooleut. The defendant, probably, knowing the land for which he was in treaty, there is no reason to suppose that he was misled, or that he has not substantially obtained that land, and he cannot now evade the payment of the rent contracted for by availing himself of the error or misdescription (if it exists) of the actual quantity given in the kubooleut. There is no reason to suppose that on either side any misrepresentation was used. The Lower Appellate Court has, in our opinion, erroneously directed a remand of the suit under these circumstances, for the purpose of having it ascertained what upon measurement the actual quantity of the land is. The Court of first instance rightly held that the defendant was bound to pay the amount of rent which he had agreed to pay, and we think that the judgment of that Court should be confirmed and this special appeal allowed with costs.

The 25th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Section 54 Act X of 1859.

Case No. 2058 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Additional Special Commissioner of Jessore, dated the 23rd of May 1863, reversing a decision of the Deputy Collector of that District, dated the 18th November 1862.

Okoor Chunder Mitter (Plaintiff) *Appellant,*

versus

Bhagirath Saha (Defendant) *Respondent.*

Baboos Brojonath Dass and *Prosunno Coomar Sein* for Appellant.

Baboo Mutty Lall Mookerjee for Respondent.

Section 54 Act X of 1859 precludes a plaintiff from again instituting a suit struck off under that Section, if barred by limitation.

Jackson, J.—THE plaintiff sued his landlord to recover possession of a tenure of 10 cottahs of land, from which he alleged the landlord had illegally dispossessed him. The suit was first brought in the Moonsiff's Court on the 12th Assin 1267 (27th September 1860). It was received but was afterwards rejected for want of jurisdiction on the 27th June 1861, and the plaintiff was referred to the Collector. The plaintiff then instituted a suit before the Collector, but this was struck off the file on the 31st October 1861. He again instituted this suit on the 23rd November 1861. The alleged dispossession is said to have taken place on the 9th Maugh 1264. The defendants pleaded limitation.

The Collector admitted that, under the terms of Act LIII of 1860, the plaintiff not having preferred his suit within two years from the 1st August 1859, that suit was barred by limitation. But he was of opinion that the time during which the suit was pending before the Moonsiff's Court should be taken into consideration, and deducting that period from the two years, he held that the plaintiff was within time.

On appeal the Judge reversed this decision, considering that the limitation law in question allowed of no deduction, but was imperative.

On special appeal we are again asked to allow the deduction to be made. But we think that the Judge has taken a correct view of the law, and that the plaintiff was bound to institute his suit within the proper time. The plaintiff had full opportunity for doing so, as the Moonsiff referred him to the Collector on the 27th June 1861, when two months remained before his suit could be rejected on the ground of limitation. The plaintiff did institute a suit before the Collecter, it does not appear whether within these two months or after their expiry; but he allowed his suit to be struck off under Section 54 Act X of 1859. This Section

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precludes a plaintiff from again instituting a suit so struck off if barred by the law of limitation.

The Lower Court very properly dismissed plaintiff's suit, and we must dismiss this appeal with all costs.

The 25th July 1864.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Presumption under Section 4 Act X of 1859—Rebuttal.

Case No. 38 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. J. E. S Lillie, Judge of Hooghly, dated the 3rd October 1863, *affirming a decision passed by Moulvie Fedda Ali, Deputy Collector of that District, dated the 3rd July* 1863.

Baboo Beni Ram, husband and guardian of Soorjo Coomaree Debia, (Plaintiff) *Appellant.*

versus

Tara Chand Chuter (Defendant) *Respondent.*

Baboo Prosunno Coomar Sen for Appellant.

Baboos Rajender Narain Misser and *Bhyrub Chunder Banerjee* for Respondent.

Case remanded in order to give the plaintiff an opportunity of adducing evidence to rebut the presumption arising in the defendant's favor under Section 4 Act X of 1859.

Morgan, J.—It was proved that the rent at which the defendant held the land had not been changed for a period of 20 years before the commencement of the suit. The presumption enacted by the 4th Section of Act X of 1859, that the land had been held at that rent from the time of the permanent settlement, and that no suit for enhancement could be maintained, therefore arose. But it is objected, in special appeal, that, by the provision of that Section, such presumption arises only "unless the contrary be shown, or unless it be proved that such rent was fixed at some later period." The appellant objects that he was in a position to rebut the presumption and to show the contrary, and that the Lower Courts improperly deprived him of the opportunity of doing so.

The terms of the judgment of the Court of first instance lead us to think that this objection is, as to that Court, well founded. After stating that "the plaintiff has admitted that the defendant is in the occupancy of the land for 25 or 26 years," the Deputy Collector remarks "there is no necessity for taking further proof on that head, because Section 4 Act X clearly provides that, if the rent at which land is held by a ryot has not been changed for a period of 20 years before the commencement of the suit, it shall be presumed that the land has been held at that rent from the time of the permanent settlement; and Section 15 states that no ryot holding his tenure at a former rent, which has not been changed from the time of the permanent settlement, shall be liable to any enhancement of such rent."

The Judge, in appeal, observes, :—"The plaintiff cannot show that the rent of the land was fixed at any time since the permanent settlement, and the presumption mentioned in Section 4 consequently arises. With reference to the provisions of Sections 3 and 4 of Act X, the defendant is protected from any enhancement of rent," and he dismisses the appeal.

It is not apparent to our satisfaction that either of the Courts below have given the plaintiff proper opportunity of adducing the evidence which he professes to have, whereby the presumption of the 4th Section may be rebutted, and we remand the case to the Court of first instance, in order that he may have an opportunity of adducing such evidence.

The 25th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Assessment—Boundaries.

Case No. 3579 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. R. Cockerell, Additional Judge of Nuddea, dated the 29th September 1863, *reversing a decision passed by the Deputy Collector of that District, dated the 8th July* 1863.

Hurri Mohun Banerjee and others (Defendants) *Appellants,*

versus

Maharajah Sutis Chunder Roy Bahadoor, (Plaintiff) *Respondent.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Sreenath Dass for Respondent.

A landlord is bound to point out, either by boundaries or some other definition, the lands which he wishes to assess.

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Bayley, J.—In this case plaintiff as zemindar, sued for a kuboolent as to 5 beegahs of land, at Rs. 57-5-6½ for the 5 beegahs.

The defendant first pleaded below that there was no specification of boundaries in the plaint; next, that the land was valid rent-free, of which defendant held a mokurruree from the lakherajdar; that no rents had ever before been paid to plaintiff; and that the lakherajdar had, on the plaintiff's suit to resume and assess, confessed judgment by collusion; that plaintiff being in the place of the lakherajdar, defendant could by that fact prove both the lakheraj and mokurruree titles in this suit.

The first Court decided that all that could be held to be shown by plaintiff as to the boundaries was that the 5 beegahs were in the south-west corner of the whole block, (*i. e.*, one of 82 beegahs more or less of a compound at the station of Kishnaghur wherein are the premises called the Old College), and that as there were no sufficient data proved by plaintiff by which to execute a decree if given, his suit must be dismissed.

It was dismissed accordingly.

On appeal the Judge found that plaintiff had before brought a suit to assess the above 82 beegahs, and that 69 beegahs of the 82 beegahs, (defined by the Judge as 74,) had been declared to be held under a valid mokurruree title, irrespective of the 5 beegahs of lakheraj which were exempted as *primâ facie* held under that title; that then, plaintiff had sued the lakherajdar for the assessment of the 5 beegahs, and got a confession of judgment. The Judge holds, on these facts, that, as the occupancy of the 5 beegahs by defendant is admitted, and the land is in the midst of the 74 beegahs without natural definition, and the defendant admitted possession of the beegahs 74 as mokurrureedar, it was for the defendant to point out the 5 beegahs and not for the plaintiff; and as plaintiff's rates were fair, a decree should be given him. The Judge gave a decree for plaintiff accordingly.

In special appeal it is urged—

1*st.*—That in all suits, it is for plaintiff to point out, either by boundaries, or some other definition, the lands which he wishes to assess.

2*ndly.*—That a notice under Section 13 Act X of 1859 was necessary, and had not been given.

3*rdly.*—That the confession of judgment as to the 5 beegahs of lakheraj only bound the lakherajdar, and not defendant as the mokurrureedar.

4*thly.*—That the question of defendant's mokurruree title was not gone into by the Judge at all.

Judgment.

On the first point, the proper principle is that there should be, on the part of the plaintiff, such a specification or definition of boundaries that a Court may know the lands as to which, if it gives a decree to a plaintiff, that decree shall operate. Can these data be said to exist here? These 5 beegahs are admitted and found to be in a compound which is stated to be 74 beegahs, but of 69 beegahs of which defendant is admitted to hold a mokurruree. The Judge seems to consider that, therefore, the defendant's mokurruree from the lakherajdar must be for the remaining 5 beegahs, and that this is sufficient indication of the identity. It may, however, happen that the 5 beegahs may be interspersed with the other lands, or so situated that the exact area may be more or less than 5 beegahs, or otherwise that this inferential finding is not correct. We think, therefore, that some more precise definition is requisite before it can be said that a decree, if passed for plaintiff, can be duly executed.

The mode in which a definition, sufficient for the purpose, can be arrived at, is by the Lower Court calling on plaintiff to point out the 5 beegahs which he claims and have them marked off by bamboos, and let plaintiff call evidence to prove his statement that those are the 5 beegahs. On that being done, defendant may, if he can, rebut that; and if he fails, the lands so pointed out by plaintiff may be considered those for which plaintiff sues, and against which a decree, if given, may go. Whether defendant is able to rebut plaintiff's definition by evidence or not is for the Lower Court to decide.

Then will remain the question whether, as held by the decision of 1850, S. D. A. Reports, page 167, a mokurruree, except where otherwise stipulated, falls with the resumption of the parent tenure, or whether, and under what circumstances, and to what extent that decision can be deemed modified by more recent decisions as to the position of the mokurrureedar as a middleman in properties where the parent lakheraj may have been resumed, or allowed, as here, to be mal.

Remand accordingly.

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The 25th July 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Presumption under Section 4 Act X of 1859—Consolidation of holdings—Omission of fractions by Settlement Officer — Enhancement (by proprietors taking settlement from Government).

Case No. 2549 of 1863 under Act X of 1859

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-*Pergunnahs, dated the* 16*th June* 1863, *reversing a decision of Mr. C. B. Garrett, Deputy Collector of that District, dated the* 19*th March* 1863.

Sukhi Mani Haldar (Defendant) *Appellant,*

versus

Gunga Gobind Mundle (Plaintiff) *Respondent.*

Mr. C. Gregory and *Baboo Opendro Chunder Bose* for Appellant.

Baboos Mohesh Chunder Chowdry and *Roop Nath Banerjee* for Respondent.

The consolidation of several holdings into one, or the omission of fractions by the Settlement Officer, cannot deprive a ryot of the benefit of the presumption under Section 4 Act X of 1859.

A proprietor who has taken settlement from the Government, and has accepted the settlement jummabundee, cannot sue for enhancement on the mere ground that the rate is below the prevailing rate, but must sue either on the ground of increase in the value of the produce, &c., or of an excess quantity of land.

Campbell, J.—This appears to be a suit by the purchaser of a Government khâs mehal for a kubooleut at the rate prevailing in the neighbourhood.

We think that the Judge has misconstrued defendant's answer as containing admissions fatal to his plea of holding at fixed rates from 1790, on which ground the first Court had decided in his favor.

The defendant alleges distinctly, in the very first words of his answer, a holding from time immemorial. He goes on to say that the greater part of the ground was his own ancestral holding, and that he purchased 3 smaller plots. He specifies the former jumma of each holding, all falling at a rate either exactly or very closely approaching 12 annas per beegah. He then says that, when the estate came into the hands of Government, the Settlement Officer in 1240 consolidated the whole into one holding at 12 annas per beegah, recording him in the settlement papers as a mourosee ryot, and that he has so held it ever since. In this we consider that there is nothing inconsistent with an invariable holding from 1790. The consolidation of the 4 holdings into one would not affect the question if each tenure was a good tenure, and even if the Settlement Officer for simplicity omitted fractions in the rate, we should not consider that to be a material variation destroying the right to hold at fixed rates. We are, therefore, of opinion that if, as defendant alleges, and as the first Court has found, the defendant has continued to hold to the present time at the rate of 12 annas per beegah recorded in 1240, he must have the benefit of Section 4 of Act X, and, in the absence of proof to the contrary, must be held to be a ryot whose rent is fixed for ever. The case must be remanded for trial on this issue.

As respects defendant's 1st and 2nd pleas in special appeal, he seems to confound a "mourosee" with a "mokurruree" holding. By his own showing he is recorded only as a mourosee, that is, a hereditary ryot; but there is nothing to show whether he possessed mokurruree rights or only rights of occupancy. The Judge would be wrong in saying that no proclamation or condition of sale could render the rent permanent. Government as owner of a khas mehal, might make or declare all the ryots "mokurruree," and might sell on those conditions. But appellant has not shown us that Government did so, and we know that Government, in practice, never does so. We think, however, that, if the tenure proves not to be mokurruree, the case before us comes exactly within the purview of the decision of the Sudder Court in the case of Jogender Chunder *vs.* Tarachand, 755 of 1858, decided on 17th September 1859. In this respect the law has not been materially altered, and this case must be governed by the law there laid down. If, then, the proprietor taking settlement from Government has, either expressly or by the terms of proclamations and conditions of sale, accepted the jummabundee, he is precluded from disputing the correctness of that jummabundee as it existed at the time. The rate then recorded must be conclusively held to be the fair and equitable rate of that time payable by the ryot; and the proprietor or his successors seeking to enhance in after years must show that, *since* the period of settlement, circumstances have occurred to raise the value of the land and so to entitle him to an enhanced rent. In the terms of the existing law, the proprietor, then, who has

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accepted the settlement jummabundee, being so far concluded, cannot come in for enhancement under the first Clause of Section 17 of Act X on the mere ground that the rate is below the prevailing rate, but must come under the 2nd or 3rd Clause, and show either increase in the value of the produce, &c., or an excess quantity of land.

In this case the question of holding at a fixed rate from 1790 will first be tried. If that is given against defendant, then, as directed in Tarachand's case, the matter will be remitted to the first Court, which will find whether the jummabundee of 1240 was made as defendant alleges and accepted by the purchaser; and if so, will give plaintiff an opportunity of showing that, since 1240, the value of the land in defendant's possession has improved to so great a degree as to warrant the rent in excess of the former rent now claimed. To such an extent as the value has increased, plaintiff will (under the circumstances supposed) be entitled to a decree, or, if there has been no increase, his suit will be dismissed. If there is neither a mokurruree nor an acceptance of the jummabundee, then plaintiff may, as originally claimed, obtain the rate prevailing in the neighbourhood.

The 26th July 1864.

Present:

The Hon'ble C. B Trevor and G. Campbell, *Judges.*

Assignment—Choses in action—Fraud—Jurisdiction — Suit for rent by Assignee—Lien—Execution against pledged property.

Case No. 2110 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 28th of April 1863, *reversing a decision of the Deputy Collector of that District, dated the 29th November* 1862.

Hurrinath Muzoomdar and others (Plaintiffs) *Appellants*

versus

Messrs. Moran and Co. (Defendants) *Respondents.*

Baboo Poorno Chunder Mookerjee for Appellants.

Mr. R. T. Allan and *Baboo Mohinee Mohun Roy* for Respondents.

In the practice of the Courts of this country, it is lawful to assign choses in action when there is neither fraud against individuals, nor special violation of the rules of public policy.

The assignee of a claim for rents can sue under Act X of 1859.

Where the holder of a lien on a factory pledged as security for the rent has obtained a decree for such rent and cannot realize it from the estate of the lessee or his assigns, he must sue in the Civil Court to enforce his right to follow the property pledged.

Campbell, J.—PLAINTIFF sues under Act X of 1859 in the character of assignee of the right of the zemindar to arrears of rent alleged to be due from defendants. The first Court found that the assignor had only ⅔rds of the right claimed, and, reducing the claim accordingly, decreed the remainder. But the Judge, on the ground that, under the decision of the late Sudder Court quoted by him, the assignor had lost his rights, that the right of action had been assigned for a sum much below the amount claimed, that therefore fraud was apparent and "*ex turpi causâ non oritur actio,*" threw out the claim altogether.

It seems to us that the Judge has quite misread the decree of the Sudder Court, which was partial only, and that the assignor without doubt remained in possession of ⅔rds of the estate as found by the first Court. We also cannot find that the Judge has discovered any specific fraud against creditors or others, or injury to any particular person. He seems only to surmise that the transaction may be a fraud against some one. It seems to be established that in the practice of the Courts of this country it is lawful to assign choses in action when there is neither fraud against individuals nor special violation of the rules of public policy.

It seems to have been clearly ruled by this Court on the 4th December last in the case of Shama Soonderee Dossee, quoted by the Judge, that the assignee of a claim for rents can sue under Act X, and we do not find anything in this particular case to shut out the claim which may after all turn out to have been sold for a consideration not so inadequate when the difficulty of realization is bad in view. We must consider, then, following the precedent above quoted, that the plaintiff is entitled to an adjudication of his claim, it being of course understood that he stands in the shoes of the assignor Gobind Pershad, and that the defendants are in no way prejudiced by the transfer, but have the right to plead everything which they might have pleaded against Gobind Pershad, and to insist on the testimony on oath of Gobind Pershad or other procedure of which they might have availed themselves in a suit brought by Gobind Pershad himself. So far, then, as regards the period during which Messrs. Moran and Co., the

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defendants, held the lands for which the rent is claimed, we have only to remand the case to the Judge for an adjudication on the merits on the plea of payment, and we direct accordingly.

But we find that part of the claim is for a period during which Moran and Co. did not hold possession, and it is alleged that Moran and Co. did not take over the liabilities from the former lessees. Plaintiff's claim against Moran and Co. for this period can in that case only be based on the alleged lien on the factory said to be pledged as security for the rents now claimed. Plaintiff in fact could then only seek to follow the factory in Messrs Moran's hands, and that seems to be rather a matter for the Civil Courts than for the Revenue Courts. We think that for the period in question plaintiff must make the representatives of the late Mr. Deverine, the lessee of the period, defendant. We, therefore, direct that an opportunity may now be given to him of making Deverine's representatives parties to this suit, and any decree passed against Deverine or Moran for rent will be conclusive, and may not afterwards be disputed by Moran so far as concerns the fact that the rent is due. But the claim against Moran as holding the property pledged in security, cannot be adjudicated in this suit. Plaintiff having got a rent decree must, if he cannot realize it from the estate of the lessee or his assigns, go into the Civil Court to enforce his right to follow the property pledged.

The 27th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Enhancement.

Case No. 2064 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. Hope, Officiating Judge of Hooghly, dated the 8th June 1863, *reversing a decision passed by Moulvie Feda Ali, Deputy Collector of Howrah, dated the 25th February* 1863.

Mathura Mohun Saha (Plaintiff) *Appellant,*

versus

Gyaram Haldar (Defendant) *Respondent.*

Baboos Onookool Chunder Mookerjee and *Upprokash Chunder Mookerjee* for Appellant.

Baboos Banee Madhub Banerjee and *Oopendur Chunder Bose* for Respondent.

Where a pottah contains no term and does not provide against enhancement, and the tenant has not occupied for 12 years, if it is shown that the tenant has improved the land, he will be entitled to a proportionate reduction in determining the rent he should pay. But if it is also shown that the value of land generally in the neighbourhood has increased irrespective of the agency of the ryot, the landlord will be entitled to enhancement proportionate to that improvement.

Jackson, J.—This was a suit for enhancement of a tenant's rent. It was contested by defendant on two grounds, *first*, that the plaintiff's pottah gave him the land at a fixed rent; *secondly*, that the tenant had improved the land at his own expense.

The first Court decreed the claim to enhance to the extent of 2 rupees per beegah, overruling defendant's objections,—the *first* because the pottah did not fix the rent, the *second* because the tenant was not a ryot with right of occupancy.

On appeal, the Judge reversed this decision. He held that the land had been much improved by the tenant, and that it was leased permanently, as the pottah contained no term.

We think the Judge is wrong. The pottah contains no terms barring enhancement. It does not fix the rent in perpetuity or for any term of years. The tenant has not occupied for 12 years, and, therefore, has no right of occupancy. He may have improved the land, and to that extent he may be entitled to some reduction in determining what rent he shall pay. But it is also shewn that the value of land generally in his neighbourhood has been much increased by the Railway; and this being an improvement irrespective of the agency of the ryot, involves an element on which claim to enhance proportionate to *that* improvement may be based. On the whole, then, we consider that the Judge's decision must be reversed, and that of the first Court confirmed. The respondent to pay all costs.

The 27th July 1864.

Present:

The Hon'ble C. Steer and W. S. Seton-Karr, *Judges.*

Onus probandi — Protection from ejectment by auction-purchaser.

Case No. 3591 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 28th of September 1863, *reversing a decision of the Officiating Collector of that District, dated the 5th January* 1863.

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Domun Loll and others (Defendants) *Appellants*,

versus

Pudmun Singh (Plaintiff) *Respondent*.

Mr. J. Baptist for Appellants.

Baboo Kally Mohun Doss for Respondent.

Where a ryot claims protection from ejectment by an auction-purchaser under the proviso to Section 37 Act XI of 1859, the *onus* is on the ryot to prove the character of his holding.

Seton-Karr, J.—It is argued in this case that the Judge is wrong in placing the *onus* of proving the character of the plaintiff's holding, on the auction-purchaser; and the respondent's pleader admits that this view of the law of evidence cannot well be supported. It is for the plaintiff to prove what he contends for, *viz.* that he is protected from ejectment under the proviso contained in the final part of Section 37 Act XI of 1859.

We have carefully examined the Judge's finding; but we think that his decision on this point is argumentative and not positive, and that he should consider the nature and value of the evidence to the character of the tenure as it may be adduced by the plaintiff, leaving the auction-purchaser to rebut the same, if he thinks it necessary. But the *onus* must first be laid on the plaintiff, and not on the auction-purchaser.

The case must go back to the Judge for a clear finding on the nature of the exception pleaded by the plaintiff.

The 27th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges*.

Kuboolent (Right of Putneedar to obtain — from holders of Talookee pottahs).

Case No. 2205 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 7th of May 1863, *affirming a decision of the Deputy Collector of that District, dated the* 29*th March* 1862.

Munsoor Ahmed (Plaintiff) *Appellant*,

versus

Azizooddeen and others (Defendants) *Respondents*.

Baboos Debender Narain Bose and *Greesh Chunder Ghose* for Appellant.

No one for Respondents.

The holders of a talookee pottah from the zemindar are not bound to give kubooleuts to the putneedar.

Bayley, J.—In this case plaintiffs sued as putneedars to get a kubooleut from the defendants with the object that defendants should pay the rent to the zemindar through the plaintiffs.

Defendants answered that they held a talookee pottah from the zemindar, and they were not liable to give a kubooleut, or to pay the rent through the plaintiffs, but direct.

The Lower Courts held the talookee pottah to be a good one, and dismissed plaintiffs' suit.

Plaintiffs appeal specially, and urge that, as putneedars, they ought to receive the rents from the defendants, and in order to do so formally, they have to sue for and obtain from them a kubooleut.

We do not think this objection valid.

The defendants have already contracted to pay the rents to the zemindar. If the zemindar requires them under his arrangements with the plaintiffs as putneedars to attorn to the putneedars, he should take measures to give notice and make assignments accordingly. Then the rents payable under the defendants' talookee pottah to the zemindar will become rents payable under the same pottah to the assignees of the zemindar, *viz.* the plaintiffs, but this suit for a new kubooleut is not correct.

We reject the appeal.

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The 27th July 1864.

Present :

The Hon'ble C. Steer and F. A. Glover, *Judges.*

Leases (Power of zemindar to grant).

Case No. 3583 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 29th of September 1863. *reversing a decision of the Collector of that District, dated the 27th September* 1861.

Kalla Chand Talee and others (Plaintiffs) *Appellants,*

versus

Shamasoonderree Dabee Chowdhrain (Defendant) *Respondent.*

Baboo Tarucknath Sein for Appellants.

Baboo Sreenath Doss for Respondent.

There is no restriction upon zemindars in respect of their power to grant pottahs and leases on any terms they please.

Steer, J.—THIS case was remanded to the Judge to try whether the appellant's tehsildar was authorized or not to grant the pottah pleaded by the respondent, and whether the pottah was genuine or not.

The Judge thus records his decision :—

"The pottah in question appears to be a "mokurruree one, but having been granted "avowedly subsequently to the date of "the Decennial Settlement, it cannot, under "Section 14 (or 4) of Act X of 1859, be "admitted as such. There appears, there-"fore, no occasion for enquiring into its "validity, as it can, on these grounds, at once "be set aside," &c.

Neither Section 4 nor Section 14 of Act X of 1859 have any bearing whatever upon the controversy existing in this case. Where the Judge has discovered the doctrine that a zemindar cannot now create a mokurruree tenure, and that every such tenure, created subsequent to the Decennial Settlement, is *ipso facto* null and void, it is difficult to conceive. As far as we are aware, there is not, at the present day, and there never has been, any restriction whatever upon zemindars in respect to their power to grant pottahs and leases on any terms they please, and there seems to be really no warrant whatever for the strange opinion held by the Judge on this subject. If, instead of creating a new question in the case, which does not seem to have been raised in any previous stage, and deciding it on utterly erroneous and capricious grounds, the Judge had, as instructed by this Court, confined himself to the points actually laid down, he would have satisfied all parties. As it is, the case must go back again for a third trial by the Judge. For this result, so unfortunate for the parties, and so discreditable to our judicial administration, the Judge is himself entirely to blame. The first remand was the consequence of his own neglect to look into the pleadings, and this second remand is the consequence of a disregard of the plain instructions of this Court. We cannot but express our dissatisfaction at such conduct on the part of the Judge ; and, in again remanding the case for trial upon the points laid down by this Court in its former order of remand, we hope the Judge will not fail in the third attempt to meet the justice of the case.

The 27th July 1864.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Appeal—Suit for rent below 100 Rs.

Case No. 2307 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of the 24-Pergunnahs, dated the 6th of June 1863, *affirming a decision of the Deputy Collector of that District, dated the 26th February* 1863.

Kally Doss Sircar (Plaintiff) *Appellant,*

versus

Raj Narain Pattack and others (Defendants) *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Khetter Nath Bose for Respondents.

In a suit for rent below 100 Rs. where the dispute did not allude to any right to vary the rent, but was confined solely to the question of what was the rent which the defendant had to pay, and which he had always paid, the appeal was held to lie to the Collector, and not to the Judge.

Jackson, J.—THE question at issue in this suit was, whether the defendant tenant's

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rent, for arrears of which the claim was brought, was 78 rupees per annum or 55 rupees per annum, the amount claimed being under 100 rupees.

The Deputy Collector held that the rent as proved before him was 55 rupees per annum, and decreed at that rate.

An appeal was preferred to the Judge, who rejected it under Section 153 Act X of 1859, as the amount in dispute was under 100 rupees.

It is said in special appeal that there was in this case a dispute as to the *right* to vary the rent, and that the appeal consequently was correctly taken before the Judge.

We think that the dispute did not in any way allude to any *right* to vary the rent, but was confined solely to the question of what was the rent which the defendant had agreed to pay, and which he had always paid.

The appeal under these circumstances was to the Collector, and the Judge correctly rejected it.

This appeal is dismissed with costs.

The 29th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Appeal—Sale in execution for rent—Section 105 Act X of 1859.

Case No. 192 of 1864.

Miscellaneous Appeal from an order passed by Mr. W. Wirell, Deputy Collector of Rungpore, dated the 25th January 1864.

Bhagiruttee Dassee and others, *Appellants,*

versus

Ranee Shurnomoye and Kashisurree Debea, *Respondents.*

Baboo Bykuntnath Paul and *Moulvie Murhumut Hossein* for Appellants.

Baboos Debendernarain Bose, Mohinee Mohun Roy, Annoda Pershad Banerjee, and *Mohendro Lall Shome* for Respondents.

No appeal lies from an order under Section 105 Act X of 1859 directing the sale of the judgment-debtor's tenure in execution of a decree for rent.

Jackson, J.—This is an appeal from an order in execution of decree under Section 105 Act X of 1859 selling the tenure of the judgment-debtor in payment of the decree for arrears of rent. A preliminary objection is taken by the respondent that no appeal lies.

Section 151 Act X of 1859 lays down that "no order of a Collector passed after decree and "relating to the execution thereof, shall "be open to revision or appeal otherwise than "as expressly provided in this Act." The sale in this case was held in execution of decree under Section 105 of the Act, which rules that such sales shall be held "according "to the rules for the sale of under-tenures "for the recovery of arrears of rent due in "respect thereof contained in any law for "the time being in force." The law in force is Act VIII of 1835. This Section, therefore, makes the provisions of Act VIII of 1835 a part of Act X of 1859 for the purposes of such sales. But there is no Section of either Act VIII of 1835 or Act X of 1859 which allows of any appeal from any order passed in connection with such sales. It follows that under Section 151 no appeal lies.

This appeal must, therefore, be dismissed with costs.

The 29th July 1864.

Present:

The Hon'ble F B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Suit by cultivating co-parceners to recover possession.

Case No. 302 of 1864.

Special Appeal from a decision passed by the Judge of Patna, dated the 31st December 1863, *reversing a decision of the Moonsiff of that District, dated the 6th August* 1863.

Radha Koowar and others (Defendants) *Appellants,*

versus

Rawajath Hossein Khan and others (Plaintiffs) *Respondents.*

Baboos Chunder Madhub Ghose and *Kishen Succa Mookerjee* for Appellants.

Mr. J. Baptist for Respondents.

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A suit by co-parceners of an *ijmalee* estate, who are also cultivators, to recover possession of their share of the estate, is cognizable in the Civil Court, and not under Act X of 1859.

Glover, J.—SPECIAL respondent in this case (plaintiff in the Court below) sued to obtain a declaration of his right to, and possession of, a fractional part of an ijmalee estate, amounting to 1 dam, of which his possession had been disturbed in consequence of certain orders of the Collector of the district passed in a suit under Regulation XIX of 1814. It appears from the record that special appellant was entitled to 12 sahams or shares of the ancestral property amounting to 9 dams 6 cowries and 13 bowlees of the profits of the estate. Of this, he alleges himself to be in possession of 8*d.* 6*c.* 13*b.* only. The Collector, who was employed in making the butwarra of the property, refused to separate the one dam required to make up the amount of his 12 sahams The present suit is to have this one dam added to the other 8*d.* 6*c.* 13*b.* already in his possession.

Special appellants replied that they purchased the rights and interests of Ekram Paluth and Hossein Alee Khan in the property, amounting to a certain specified share, of which, and of which only, they are in possession. They denied having interfered in any way with the special respondent's share. Others of the defendants who have not appealed, filed replies similar in effect.

The Lower Appellate Court gave the respondent a decree jointly against all the co-sharers on the ground that the estate was ijmalee, and that they were all in possession of the one dam which properly belonged to the special respondent's share, adding that the Collector would, in making the butwarra, apportion off the land representing the one dam in question, and make it over to the rightful claimant.

We see no reason to interfere with this decision, which, under the circumstances, we conceive to be the only possible solution of the difficulty. As to the special appellant's objection that the suit ought to have been brought in the Revenue Courts under Act X of 1859, we observe that the special appellants, even if they be cultivators, are at the same time co-parcenors of the estate, and in exactly the same position as the special respondent himself. As regard the subject-matter of this suit, they were in the position of zemindars, and the suit to recover possession of part of the estate was rightly brought in the Civil Court.

For the rest, we observe that the special respondent has confessedly a certain distinct share of the property, and it is not denied that the one dam which he claims is in the possession of some one of the co-sharers. Had the estate been a divided one, it would have been possible for the Judge to have carried out his own order and have given actual possession of the share now claimed from the party shewn to be in wrongful possession of the same; but as it is, these shares do not represent actual portions of land, but fractions of the yearly profits; and the Judge could not, therefore, give a specific decree against any one co-parcenor in particular. He directed the Collector, when the butwarra was going on, to ascertain the value of the special respondent's one dam, of which he declared himself out of possession, and to apportion it to him, so that he might obtain his full share of the estate, which is acknowledged, on all hands, to amount to 9*d.* 6*c.* 13*b.* Under the circumstances we do not see what other course was open to the Judge, and we confirm his order accordingly.

Taking into consideration, however, the peculiar features of this case, we think that each party should pay his own costs.

The 29th July 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation — Resumption of Lakheraj.

Case No. 3154 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 22nd August 1863, reversing a decision of the Moonsiff of that District, dated the 28th April 1863.

Nobi Buksh (Defendant) *Appellant,*

versus

Mussamut Amatulla (Plaintiff) *Respondent.*

Baboo Romanath Bose for Appellant.

Baboos Kali Mohun Doss and *Chunder Madhub Ghose* for Respondent.

Where the time for bringing a suit to resume lakheraj has run out in the life-time of a father, the right to sue is lost to his heir.

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Kemp, J.—We think that the decision of the Principal Sudder Ameen is clearly wrong, and the judgment of the Court of first instance must be affirmed.

The plaintiff is one of a body of co-sharers. She sues to resume 22 beegahs of land and to dispossess the lakherajdar. Whether the suit ought to have been brought under Section 28 Act X of 1859, or has been properly instituted under Section 30 Regulation II of 1819, it is unnecessary to decide, as it is quite clear that under either Section the suit is inevitably barred under the Statute of Limitations.

The plaintiff claims through her father who purchased the parent estate from an auction purchaser in 1245, or 1838 A. D. The father allowed 12 years and more to run out during his life-time without bringing a suit to resume the lakheraj, and also permitted 12 years to elapse from the date of the Special Commissioner's decision upholding the lakheraj without taking any further steps. The sunnud is dated in 1790, and purports to be a renewal of a former grant. The Moonsiff finds that the defendants and their predecessors have held for 72 years. The time for bringing the suit having run out in the life-time of the father, the right to sue is lost to his heiress, the plaintiff. Further, we observe that the plaintiff did not sue within 3 years from the date upon which, by her admission, she arrived at majority, and was, consequently, no longer under legal disability; *vide* Section 11, Act XIV of 1859.

The appeal must be decreed with costs and interest payable by the respondent.

The 29th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Clause 6 Section 23 Act X of 1859—Suit to recover possession—Shikmee Talookdar.

Case No. 2697 of 1863.

Special Appeal from a decision passed by Mr. J. C. Dodgson, Judge of Mymensingh, dated the 1st July 1863, reversing a decision of the Sudder Ameen of that District, dated the 26th February. 1863.

Rajchunder Surma Gosain and another (Defendants) *Appellants,*

versus

Ali Newaz Khan and others (Plaintiffs) *Respondents.*

Messrs. C. and *G. Gregory* for Appellants.

No one for Respondents.

A shikmee talookdar may sue, under Clause 6 Section 23 Act X of 1859, to recover possession.

Bayley, J.—The Lower Appellate Court held, in this case, that plaintiff being the purchaser and proprietor of a shikmee talook, and therefore of "a transferable tenure," could not be regarded as a mere ryot, farmer, or tenant as described by Clause 6 Section 23 Act X of 1859, and that the Deputy Collector, therefore, had no jurisdiction to proceed under Clause 6 Section 23 Act X of 1859, under which plaintiff had sued to recover possession. Plaintiff has appealed specially against this decision.

We think that the order of the Judge must be reversed, and plaintiff's appeal must be decreed.

The words of Clause 6 Section 23 are "*All* suits to recover the possession of any "land, occupancy, farm, or *tenure* from which "a *ryot, farmer, or tenant* has been illegally "ejected by the person entitled to receive "rent of the same" shall be cognizable by Collectors.

The words *tenant* and *tenure* are, in our opinion, quite large enough to bring shikmee talookdars within their purview; and the distinction between the words "ryot, farmer, or tenant," and "land, farm, or tenure," quite marks the broad scope of the Clause.

We accordingly decree this appeal with costs, and remand the case for re-trial.

The 30th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Jurisdiction (of Lower Appellate Court)—Points in bar—Limitation (under Act X of 1859 irrespective of that under Act XIV)—Payments for rent (how to be credited).

Case No. 2663 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. C. Fowle, Officiating Judge of Rungpore, dated the 23rd June 1863, reversing a

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decision of the Deputy Collector of that District, dated the 4th November 1862.

Ranee Surnomoye (Plaintiff) *Appellant,*

versus

Singhroop Bebee (Defendant) *Respondent.*

Baboos Aushootosh Dhur, Sreenath Doss, and *Kaliprosonno Dutt* for Appellant.

No one for Respondent.

A Lower Appellate Court should not, as an ordinary rule (except as to jurisdiction) take up points in bar not taken in the Lower Court.

The special limitation under Act X of 1859 is irrespective of that under Act XIV.

A payment for rent should be credited to the oldest rents first, and not to current rents, unless so specifically stated by the party making it.

Bayley, J.—THE pleas in special appeal are—

I. That the Judge should not have raised the plea of limitation because it was not raised in the Court below his.

II. That the Judge was wrong in deciding that Section 32 Act X of 1859 was repealed by Section 1 Act XIV of 1859.

III. That the operation of Act XIV of 1859 was postponed to the 1st July 1862, and that the law does not apply.

IV. That the payments made should have been credited to former arrears, and not to those of the current year.

We observe that limitation was not recorded as one of the issues upon which the first Court decided, nor does it appear to have been specially pleaded there. The Judge should not, as an ordinary rule, (except as to jurisdiction) take up points in bar not taken in the first Court or not urged in the trial there. The first Court's decision does not notice this amongst defendant's pleas, nor is it shown by the pleaders before us here to have been urged in bar in the first Court.

On the second plea we notice that the Full Bench of this Court have ruled that there is a special limitation under Act X of 1859, and it is irrespective of that under Act XIV. This renders any remark on the 3rd plea unnecessary.

The payment should be credited, as urged in the 4th plea, to the oldest arrears first, and not to current rents, unless specifically stated to be for the latter account by the party making it.

Under this view we reverse the order of the Judge, and decree the appeal with costs, and remand the case for re-trial with reference to these remarks.

The 30th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Suit to recover possession—Admission.

Case No. 2735 of 1863 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 20th of June 1863, *reversing a decision of the Deputy Collector of that District, dated the 27th February* 1863.

Suttrooghun Doss (Plaintiff) *Appellant,*

versus

Narain Sahoo and others (Defendants) *Respondents.*

Baboo Poorno Chunder Mookerjee for Appellant.

No one for Respondents.

Suit by a tenant to recover possession of his holding from which he alleged he had been illegally dispossessed by his zemindar who had given possession of it to another tenant. As the landlord did not deny the old tenant's pottah and dakhilas, the plaintiff was held entitled to a decree against the landlord, and not bound to produce evidence to refute the new tenant's statement of the documents being forgeries.

Jackson, J.—THIS was a suit by a tenant to recover possession of his holding from which he alleged he had been illegally dispossessed by his zemindar who had given possession of it to another tenant.

The old tenant in support of his claim put in his landlord's pottah and receipts for rents for several years. The landlord admitted that these documents were genuine, but the *new* tenant declared them to be forgeries.

The first Court decreed the claim; but, on appeal, the Judge dismissed it, because the plaintiff had not proved that the pottah and receipts had been attested.

It is said on special appeal that the plaintiff was dispossessed by his landlord; and that, as the landlord did not deny his pottah and dakhilahs, plaintiff was entitled to a decree against the landlord, and he was not bound to produce evidence to refute the statements of the new tenant.

We think that, under these circumstances, the plaintiff was entitled to a decree against the landlord; and, reversing the decree of the Judge, we accordingly decree him possession against the landlord. If the new tenant refuses to give plaintiff possession, the plaintiff must sue him in the Civil Courts when the issue between them will be tried and adjudicated upon.

The landlord, respondent, will bear his own and the plaintiff's costs, as well as those of the new tenant Atkinson.

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MISCELLANEOUS RULINGS.

The 4th January 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Cross-decrees—Section 209 Act VIII of 1859.

Case No. 250 of 1863.

Miscellaneous Appeal from an order passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 31*st March* 1863, *reversing an order passed by the Principal Sudder Ameen of that District, dated the* 1*st September* 1862.

Sheo Prosunno Singh (Judgment-debtor) *Appellant,*

versus

Shib Lal Jha and others (Decree-holders) *Respondents.*

Baboo Nil Madhub Sen for Appellant.

Mr. J. Baptist for Respondents.

According to Section 209 Act VIII of 1859 which is imperative and gives no discretion, cross-decrees, whether appealed or not, must be set against one another, the larger of the two decrees being executed for the difference.

Campbell, J.—It appears to us that both the Lower Courts are wrong. They should proceed under the very clear and simple provisions of Section 209 of the Civil Procedure Code, which, in regard to decrees passed, are imperative, and give no discretion. A decree is a decree till it is reversed, whether it be appealed or not. In the case of cross-decrees, they must be set against one another, and the larger of the two decrees only can be executed, and that only for the difference. The cross-decree of the debtor must, therefore, be set off, and the order of the Courts below is reversed accordingly. Should either decree be reversed in appeal, the decree of the Appellate Court can then be executed.

The 4th January 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Hindoo Law—Son (liability of—for father's debts).

Case No. 239 of 1863.

Miscellaneous Appeal from an order passed by Mr. O. W. Malet, Judge of Beerbhoom, dated the 21*st February* 1863.

Maharajah Dheraj Mahatab Chand Bahadoor (Decree-holder) *Appellant,*

versus

Huro Mohun Acharjee, deceased, (Judgment-debtor) and others (Objectors) *Respondents.*

Mr. H. Stainforth, Moonshee Ameer Ali, and *Baboos Juggodanund Mookerjee* and *Chunder Madhub Ghose* for Appellant.

Baboos Tarucknath Sen, Banee Madhub Banerjee, and *Romanath Bose* for Respondents.

According to Hindoo Law, a son, who has not inherited his father's estate, is not liable for the father's debts.

Kemp, J.—We have not been able to gather from the Judge's decision what plea

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the objector raised. It appears from the statements of the pleaders that the point is whether a Hindoo, who has not inherited the estate of his father, is legally liable for his debts. We think that the Judge was right in rejecting the application of the decree-holder for execution against the son of the decree which he obtained against the father. The injunction in the Shasters to pay a father's debts is monitory, and will not make a son, who receives no assets, liable.

The appeal is dismissed with costs and interest.

The 9th January 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Minors (Guardianship of).

Case No. 265 of 1863.

Miscellaneous Appeal from an order passed by Mr. A. A. Swinton, Judge of Tipperah, dated the 24*th March* 1863.

Sufferoonissa Beebee and others, *Appellants,*

versus

Gholam Hossein Chowdhry, *Respondent.*

Baboo Romesh Chunder Mitter for Appellants.

No one for Respondent.

Under Section 14 Act XL of 1858 an estate ceases to be subject to the jurisdiction of the Court of Wards when any of the co-proprietors attain majority; but the Judge may, on the representation of the Collector, direct him to retain charge of the persons and shares of the still disqualified proprietors during the continuance of their disqualification, or until such time as it is otherwise ordered.

Kemp, J.—The estate of one Gholam Hossein, an idiot, was brought under the surveillance of the Court of Wards. This party is dead. Amongst his heirs, some have arrived at majority, and the others are still minors. On the 21st May 1862, the Government Pleader moved the Judge of Tipperah under instructions from the Collector and Commissioner of Revenue, to release certain portions of the aforesaid estate to some of the heirs of Gholam Hossein, on the plea that they had arrived at majority. The Judge directed the release, but subsequently, on the representation of the Collector that it would be inconvenient to keep a portion of a joint undivided estate under the Court of Wards, he withdrew his order, and directed the whole estate to remain under the Court of Wards. Hence this appeal.

We think that the Judge is wrong. The case appears to fall under the provisions of Section 14 Act XL of 1858. The whole estate has ceased to be subject to the jurisdiction of the Court of Wards, notwithstanding that some one or more of the co-proprietors are still minors; but the Judge may, on the representation of the Collector, direct the Collector to retain charge of the persons and shares of the still disqualified proprietors during the continuance of their disqualification, or until such time as it shall be otherwise ordered by the Court. The case must be remanded with directions to the Judge to act in accordance with the provisions of the law above quoted.

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The 11th January 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Sale in Execution — Contempt of Court.

Case No. 310 of 1863.

Miscellaneous Appeal from an order passed by Mr. W. B. Buckle, Judge of Backergunge, dated the 7th April 1863.

Mohesh Chunder Mookerjee (purchaser at an auction-sale), *Appellant.*

Baboo Kadarnath Chatterjee for Appellant.

A party who bids for an estate at a sale in execution, with knowledge that he is not in a position to deposit the earnest money, obstructs the business of the Court, and is guilty of contempt of Court punishable under Section 228 of the Penal Code.

Kemp, J.—We think that, if a party, as in this case, bids for an estate at a sale with knowledge that he is not in a position to deposit the earnest money, he is obstructing the business of the Court, and is guilty of a contempt of Court punishable under Section 228 of the Indian Penal Code; but with reference to the circumstances of this case, we reduce the amount of the fine to rupees 50.

The 15th January 1864.

Present:

The Hon'ble C. Steer, *Judge.*

Jurisdiction—Special Appeal—Damages—Title.

Case No. 2752 of 1863.

Shib Deen Tewary, *Appellant,*

versus

Bukshee Ram Protab Singh, *Respondent.*

Baboo Gopeenath Mookerjee for Appellant.

No one for Respondent.

A suit for the price of trees cut down and removed is not the less a suit for damages, because the Court, in order to determine whether the plaintiff is entitled as damages to the value of his trees, has to go into evidence as to whether they belong to the plaintiff or not Such a suit is cognizable by a Court of Small Causes, and no special appeal will lie.

The plaintiff in this case sued for the price of trees which the defendant had cut down and removed.

The defendant said that plaintiff was not entitled to the price of the trees, because they, together with the land on which they grew, were his.

The first Court laid down these issues :—

1. Does the land belong to the plaintiff or not?

2. Is plaintiff in possession or not?

3. How many trees has the defendant cut down, and what is their value?

On these issues the Court decided that there had been a former litigation in regard to this property between the plaintiff as plaintiff, and the defendants as objectors, and he regarded this as conclusive of the plaintiff's right to the land, and the question of right could not again be adjudicated under Sections 2 and 3 Act VIII of 1859. There had also been former decisions shewing that the plaintiff was in possession. The Court having visited the spot, and unable therefrom to ascertain the number of the trees cut down, assumed the number of them to be what the defendant himself admitted, and assuming the value of them to be on an average as taken in the former case he gives the plaintiff a decree for that amount, *viz.* 12 rupees.

The defendant appealed to the Judge, who agreed with the Moonsiff in regard to the conclusive nature of the former suit; and agreeing also with him in the rest of his decision, he affirmed it and dismissed the appeal with costs.

The defendant desires to prefer a special appeal, and the question is whether the suit of the plaintiff is in the nature of those made cognizable by the Small Cause Courts or not?

The suit is for value of trees cut and removed by the defendant. If there was no question as to the plaintiff's title to the trees, it is evident that the suit would be one for the Small Cause Court. But the defendant raises a question of title; and in order to decide whether the plaintiff is entitled as his

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damages, the Court has, only for the purpose of disposing of that question, to enquire into title. That the Court, in order to determine whether the plaintiff is entitled as damages to the value of his trees, has to go into evidence as to whether they belong to the plaintiff or not, does not make the suit less a suit for damages. The right to damages depends on whether the trees are the plaintiff's; but because this question is raised does not alter the nature of the suit.

I hold then that the suit is one of a nature made cognizable by the Court of Small Causes, and that no special appeal will lie. *Vide* 27th Section Act XXIII of 1861.

The 26th January 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Appeal (Rejection of)—Stamp.

Case No. 127 of 1863.

Miscellaneous Appeal from an order passed by Mr. R. Abercrombie, Judge of Dacca, dated the 13th December 1862, affirming an order passed by the Principal Sudder Ameen of that District, dated the 29th April 1862.

Anund Mohun Ghose and another (Decree-holders) *Appellants,*

versus

Doorga Doss Dutt and others (Judgment-debtors) *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Baboos Dwarkanath Mitter and *Prosunno Coomar Sein* for Respondents.

Before rejecting a petition of appeal on the ground that it is insufficiently stamped, the Court ought to require the appellant to supply additional stamp paper.

Steer, J.—THERE is no doubt that the appeal to the Judge was one under Section 231 of Act VIII of 1859, and no other Section gives any right of appeal under the circumstances of the appellant's case. The appeal then ought to have been made on a full stamp, and the Judge is right in so ruling. But, seeing that the petition of appeal was on stamp paper of insufficient value, the Judge ought, instead of at once rejecting the appeal, to have required the appellant to supply additional stamp paper; and if such requisition had not been complied with, the Judge might then have rejected the petition. We therefore allow the special appeal and direct that the Judge apply the provisions of Section 31 Act VIII of 1859 to the case and act accordingly.

The 26th January 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Certificate (under Act XXVII of 1860)—Will.

Case No. 124 of 1863.

Miscellaneous Appeal from an order passed by Mr. F. B. Kemp, Judge of Jessore, dated the 19th December 1862.

Bidhoo Bhooshun Mookerjee, *Appellant,*

versus

Issur Chunder Roy Chowdhry, *Respondent.*

Baboo Romanath Bose for Appellant.

Baboo Kadarnath Mojoomdar for Respondent.

The executor under a will, if it be not contested, has an undoubted right to a certificate under Act XXVII of 1860, though he be not the legal heir. If the will be contested, the Judge should enquire into its validity, and, if he consider it proved, give a certificate, leaving the parties dissatisfied to set it aside by a regular suit.

Loch, J.—THIS was an application for a certificate under Act XXVII of 1860. The applicant stated that he was left executor under a will. The Judge says he cannot enquire into the validity of a will summarily, and refuses to give the certificate because he is not the legal heir. This is a mistake. If the will is contested, the Judge should enquire into its validity, as has been held by the late Sudder Court in very many cases; and if he consider it to be proved, he should give the certificate, leaving the parties dissatisfied to set it aside by a regular suit. If the will be not contested, the executor

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under that will has an undoubted right to the certificate, though he be not the legal heir. The appeal is admitted, and the case remanded to the Judge, who will dispose of it with reference to the above remarks.

The 27th January 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Section 243 Act VIII of 1859 — Lease or Mortgage of Attached Property.

Case No. 264 of 1863.

Miscellaneous Appeal from an order passed by Baboo Ram Taruck Roy, Officiating Principal Sudder Ameen of Rungpore, dated the 6th April 1863.

Luchmeeput Doogur (Decree-holder) *Appellant,*

versus

Maharajah Jugut Indur Tewaree and others (Judgment-debtors) *Respondents.*

Messrs. G. Plowden and *H. Stainforth* and *Baboo Bungshee Buddun Mitter* for Appellant.

Baboo Juggodanund Mookerjee for Respondents.

Section 243 Act VIII of 1859 gives no authority to a Court to give a lease or mortgage of attached property, but only to give time to the judgment-debtor to mortgage or let his land or sell part of it when he can satisfy the Court that there is reasonable ground to believe that the amount of the decree will be raised thereby.

Steer, J.—THIS is an appeal against the order of the Principal Sudder Ameen of Rungpore, making provision for the gradual payment of the judgment-debts to the amount of rupees 4,14,568-7-5, for which execution has been sued out in usual course.

The arrangement made by the Principal Sudder Ameen is that he has assumed the surplus assets of the debtor's estate to be 64,000 rupees per annum, at which sum he has given a lease to a party who is himself one of the judgment-debtors, and liable as such jointly and severally with the rest for the whole amount of the decrees.

Now, whether we regard the party with whom the above contract has been made as a manager or as a lessee, the arrangement is highly objectionable, if not altogether illegal.

If the party is a manager, his appointment, without the consent of all the creditors, is most improper, he being himself one of the debtors; and as such liable, if the creditors choose so to treat him, for the whole amount of the decrees. If he is a manager, the Principal Sudder Ameen has no business to interfere in the way he has done by making a farming settlement of the attached estates with him.

If he is to be regarded as a lessee, which, indeed, is his proper character, there is not only the same objection to the appointment on the ground of his being himself the judgment-debtor, but the lease is altogether illegal.

Section 243 of Act VIII of 1859 does certainly speak of leases and mortgages, but it gives no authority to the Court to give a lease or a mortgage. All that the law allows is to give the debtor time to mortgage his land or let it or sell part of it, where it can satisfy the Court that there is reasonable ground to believe that the amount of the judgment may be raised by such means. But the Court cannot do these things; and it is quite opposed to the intention of the law that a debtor should be allowed to give a lease or a mortgage except where his doing so will enable him to raise the money for the immediate liquidation of the decree.

The order of the Principal Sudder Ameen must, therefore, be set aside; and as it is clear that the assets of the estate are quite inadequate for the payment of the decrees against the respondent within a reasonable time, it is out of the question to appoint a manager. The decrees may possibly be satisfied by the sale of part of the lands, or by a mortgage, or a lease; and if the debtors are able to satisfy the Principal Sudder Ameen that they will be able to make some such arrangement as will give them the means of paying off the judgment-debts at once, there is no objection why a reasonable time, say three months, should not be allowed them for this purpose, otherwise a due consideration to the rights and interests of the creditors requires that the lands should be sold.

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The order of the Principal Sudder Ameen is accordingly reversed ; and in the future disposal of the case, the Principal Sudder Ameen will be guided by the above directions.

The 27th January 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Certificate (under Act XXVII of 1860)—Will.

Case No. 838 of 1863.

Miscellaneous Appeal from an order passed by Mr. E. F. Lautour, Judge of Patna, dated the 13th July 1863.

Syud Agameer, *Appellant,*

versus

Gomanee Khanum, *Respondent.*

Messrs. C. Gregory and *G. Gregory* for Appellant.

Mr. R. T. Allan for Respondent.

Claim under a will to a certificate to enable applicant to collect the debts of a deceased Mahomedan under Act XXVII of 1860. No necessity for collecting debts being shewn, and the inheritance being disputed,—HELD that the Judge was right in refusing to give a certificate under that Act.

Campbell, J.—APPELLANT claimed under a will a certificate to enable him to collect the debts of a deceased Mahomedan under Act XXVII of 1860. It appears that some very trifling property was attached in the district in which this application was made, but that there is large property in another district. If appellant had come in under Act XIX of 1841, he would have been entitled to a summary decision regarding the possession of the property. But as he chose to come for a certificate under Act XXVII of 1860, and we do not see that any necessity for collecting debts was made out, we think that applicant probably only wished to make evidence to establish his claim to the property in the other district, and that the inheritance being extremely doubtful and disputed, the Judge was right in refusing to give any certificate under Act XXVII of 1860. The appeal is therefore dismissed with costs.

The 27th January 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Limitation—Execution.

Case No. 388 of 1863.

Miscellaneous Appeal from an order passed by Mr. F. Tucker, Judge of Shahabad, dated the 27th May 1863.

Baboo Bishonath Panrey (Judgment-debtor) *Appellant,*

versus

Chowdhry Kripa Narain Singh (Decree-holder) *Respondent.*

Baboos Luckhee Churn Bose and *Banee Madhub Banerjee* for Appellant.

Baboo Mohendro Lal Shome and *Moulvee Syud Murhumut Hossein* for Respondent.

Section 2 Act XI of 1861 does not give a fresh starting point, but simply restricts the operation of Section 20 Act XIV of 1859 until the 1st January 1862, without reference to the date of the passing of Act XIV, or without curtailing the period within which limitation under that Act bars a claim to revive a decree passed before the passing of the Act

Where the last application to execute a decree passed in 1854 was made in November 1862—HELD that the case must be disposed of under Act XIV.

Kemp, J.—THE original decree was passed in 1854, and the last application to execute it was in November 1862. Under the old Limitation Law, this application was well within time ; but as the last application to revive the execution was made in November 1862, the case must be tried under the provisions of the new Limitation Law, Act XIV of 1859, and not as if that law had not been passed, which would have been the case, had the application for revival been made before 1st January 1862.

Under Section 20 of the new Limitation Act, the application, not having been made within three years from the date of the last process to enforce the decree (for we hold that the mere presentation of a petition praying for revival without taking further steps to enforce the decree will not take the case out of the Act), is not in time.

Section 2 Act XI of 1861 does not give a fresh starting point, but simply restricts the operation of Section 20 of Act XIV until the 1st of January 1862, without reference to the date of the passing of Act XIV, or curtailing the period within which limitation under that Act bars a claim of this description. The order of the Judge is reversed with costs.

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The 3rd February 1864.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Pleading—Defect of parties—Unregistered Trading Company—Mesne Profits.

Case No. 384 of 1863.

Miscellaneous Appeal from an order passed by Mr. A. R. Thompson, Judge of Nuddea, dated the 9th July 1863.

Mr. D. R. Tripp, Manager of Bengal Indigo Company, *Appellant,*

versus

Nursing Chunder Mitter, *Respondent.*

Mr. R. T. Allan for Appellant.

Baboos Baneenath Bose, Dwarkanath Mitter, and *Onookool Chunder Mookerjee* for Respondent.

Where a decree for wasilat was given against the manager of an unregistered Trading Company, and the plea that the Company was not a corporate body, and therefore not liable without a disclosure of the names of the parties constituting the Company, was not taken until the execution stage,—HELD that the plea was a technical one, and taken too late to be of any weight in a Court of Equity.

Kemp, J.—THE special respondent sued the late Mr. Larmour, in his capacity of manager of the Bengal Indigo Company, to recover possession of a mokururee tenure from which he had been illegally ejected by the aforesaid manager. The suit was brought under Clause 6 Section 23 Act X of 1859. The special respondent obtained a decree awarding possession with costs payable by Mr. Larmour.

As a suit for mesne profits will not lie under the provisions of Act X, the special respondent sued Mr Larmour (again as manager of the said Company) in the Civil Court for mesne profits, and obtained a decree. In execution of this latter decree, the special appellant has attached and seeks to sell certain properties belonging to the said Company, who, represented by another manager, Mr. Tripp, objected to the sale on the score that, as the act of Mr. Larmour was not within the scope of his agency, they repudiated it and contended that they were not liable. The Court of first instance held that this objection was good, and released the attached property. On appeal by the judgment-creditor, the Judge held that the Company were liable, and he reversed the order of the Court of first instance.

In appeal to this Court, Mr Allan, the pleader for the Bengal Indigo Company, the special appellant, contends

1*st.*—That the decree under Act X was a personal one against Mr. Larmour.

2*nd.*—That, in the second suit for wasilat, the Company ought to have been sued with a disclosure of the names of the proprietors, inasmuch as the said Company is not a registered Company, and therefore not a corporate body who can sue and be sued in the name of their Secretary or other principal officer.

We have to execute the second decree for mesne profits, not the Act X decree. In the former decree Mr. Larmour is made liable, not personally, but in the capacity of manager of the Bengal Indigo Company. The service of summons on Mr. Larmour who, it is admitted, was the manager of the landed estates of the Company, was a sufficient service in a suit of this description, in which service could not have been made on the directors or proprietors in person who, it is admitted, resided at the time of suit in Europe. *See* Section 61 Act VIII of 1859.

No objection was taken to the way in which the suit was framed, nor was the plea of defect of parties taken while the suit was in progress up to the final decree awarding mesne profits. Mr. Larmour defended both the suits on behalf of the Company and alleged that the special respondent resigned his mokururee tenure, and that he leased the lands to other parties on enhanced rates on behalf of the Company. It is not contended that Mr. Larmour enjoyed the mesne profits,

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or that they were not received by his employers. We therefore think that this plea that the Company is not a corporate body, and therefore not liable unless the plaintiff (special respondent) discloses the names of the parties constituting this Trading Company is a technical one, and taken at too late a stage of the case to be of any weight in a Court of Equity. If the suit had been by the Bengal Indigo Company, an unregistered Company, the defendants might have taken the above objection, as without disclosure of the names of the Company there might be some difficulty in the recovery of costs in the event of the defendants winning the suit. But in the present case, there can be no doubt that the claim was substantially against the Company, represented by their local manager, and was defended by him in such capacity and on behalf of the said Company. We therefore confirm the decision of the Lower Appellate Court, and dismiss this appeal with costs and interest.

The 9th February 1864.

Present:

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Voluntary payment (to assignee of decree-holder).

Case No. 332 of 1863.

Miscellaneous Appeal from an order passed by Moonshee Naziroodeen Mahomed, Principal Sudder Ameen of Cuttack, dated the 17*th April* 1863.

Kanoongoe Buckteshur, *Appellant,*

versus

Rajah Chunder Seekhur, *Respondent.*

Baboos Romanath Bose and *Gobind Chunder Mookerjee* for Appellant.

Baboos Obhoy Churn Bose and *Baney Madhub Banerjee* for Respondent.

A payment made by a judgment-debtor to the assignee of a decree-holder was held to be a voluntary payment which could not defeat the rights of the decree-holder.

Jackson, J.—We think that the Principal Sudder Ameen's order was manifestly right. The petitioner was one of several sureties against whom the Rajah Lilladhun had a claim. The Rajah is said to have assigned to one Denobundhoo 2-16ths of his demand upon the sureties, and to have appointed to him, as the property on which he could go in satisfaction of that claim, the specific property pledged by this petitioner in his security bond.

In legal proceedings instituted by the Rajah to enforce his claim against the sureties jointly, the assignment above mentioned, and also an assignment of the remaining 14-16ths to one Bulkishun, were set up. But the late Sudder Court, in its decree of 30th July 1858, determined that the case could go on against the sureties at the suit of the Rajah, and ordered a new trial with the Rajah as plaintiff, the result of which was a further and final decree of the same Court under date 31st December 1861, in favor of the plaintiff Rajah Chunder Seekhur, representative of Rajah Lilladhun, against all the sureties.

In the face of that decree made in his presence, the petitioner in execution set up an alleged payment made by him to Denobundhoo, and appeals to this Court because the Principal Sudder Ameen has not looked upon Denobundhoo's receipt as a discharge.

It appears that Denobundhoo was *pro formâ* a party (co-defendant) in the suit, and has not asserted his rights, and at any rate the decree was given to the Rajah and to him alone. The petitioner, therefore, in making this payment to Denobundhoo, if he has paid it at all, has done a purely gratuitous act which cannot defeat the rights of the decree-holder.

We accordingly dismiss the appeal with costs.

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The 12th February 1863.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Judgment (Filing of).

Mothoornath Chuckerbutty, *Petitioner,*

versus

Kissen Mohun Ghose, *Opposite Party.*

Baboos Gopeenauth Mookerjee and *Baney Madhub Banerjee* for Petitioner.

No one for Opposite Party.

Where a judgment in one case governed other cases,—HELD that the filing of that judgment was a substantial compliance with the requirements of the law, and that the filing of the short judgment referring to the other judgment was merely formal, and the delay excusable.

As the several cases all turned upon the confirmation of one decree, the judgment annexed to which was the judgment in all the cases, I consider that the petitioner, in filing the judgment in that particular case, complied substantially with the requirements of the law, and that the filing of the short judgment referring to that other judgment was merely formal, and the delay excusable.

The 15th February 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Witnesses (defaulting) — Evidence (service of summons and issue of proclamation)—Limit of fine.

Case No. 214 of 1863.

Miscellaneous Appeal from a decision passed by Baboo Ramtaruck Roy, Principal Sudder Ameen of Rungpore, dated the 30th March 1863.

Nilkant Bhuttacharjee, *Petitioner.*

Baboos Onookool Chunder Mookerjee and *Kishen Dyal Roy* for Petitioner.

A Nazir's report of service of summons or of issue of proclamation is not legal evidence on which to punish a witness failing to attend a Court of Justice when duly summoned.

The amount of fine that can be imposed by law on a witness evading process is limited to 1,000 Rs.

Loch, J —THE petitioner was cited as a witness, and summons was issued for his attendance followed by proclamation and attachment of goods, and in the end a fine amounting to rupees 2,000 was imposed upon him.

The petitioner states that no summons was served upon him, that he was at the time in a different district and knew nothing of the steps taken to enforce his attendance, nor was he aware that his presence was required to give evidence.

We find, so far as we can judge from the proceedings of the Lower Court, that the Court has proceeded on the simple *kyfeuts* of the Nazir, who has reported that his *peadah* informed him that he met the petitioner on the road and duly showed him the first summons for his attendance, and offered him a copy and subsistence allowance which the petitioner refused to receive. The proof of issue of proclamation rests upon a similar report. The Nazir's report of service of summons or of issue of proclamation is no doubt sufficient to admit of a Court taking steps to enforce the attendance of a witness. But when the Court proceeds to enforce the penalty, and one so heavy as in the case of a witness failing to attend a Court of Justice when duly summoned, it is necessary to see that all the steps for serving the various processes required by law have been duly observed, and the Nazir's report is insufficient for this purpose. The *peadahs* who served the processes should be examined on oath, and the party should be allowed to cross-examine them. Where a penalty is to be inflicted, it is not sufficient to suppose that the party must have been aware that his attendance was required, but evidence should be taken that the procedure

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laid down by the law has been strictly adhered to. We observe also that the only law now in force under which punishment can be inflicted on a witness evading process is the Penal Code, and Sections 172 to 175 limit the amount of fine to be imposed in cases such as the present to rupees 1,000. Considering that the investigation has in this case been very unsatisfactorily made, and that the petitioner has been convicted on what is not legal evidence, we reverse the order of the Principal Sudder Ameen and remit the fine.

The 16th February 1864.

Present:

The Hon'ble H. V. Bayley and L. S. Jackson, *Judges.*

Mesne Profits.

Case No. 379 of 1863.

Miscellaneous Appeal from an order passed by Mr. A. W. Russell, Judge of Jessore, dated the 19th May 1863.

Nobocoomar Ghose and others, *Appellants,*

versus

Rajah Indrodeb Roy, *Respondent.*

Baboos Juggodanund Mookerjee and *Chunder Madhub Ghose* for Appellants.

Baboos Dwarkanath Mitter, Sreenath Doss, and *Nil Madhub Sein* for Respondent.

Semble.—A claim for wasilat may be enforced against the heirs of the original ejector.

Jackson, J.—We think the Judge's order erroneous. He does not say, nor can the respondent's pleader show us from the record, that the decree-holder had allowed 12 years to elapse so as to be debarred from proceeding by lapse of time. On the contrary it seems that steps were from time to time taken, which were amply sufficient to keep alive the case.

The Judge's view that the claim for wasilat cannot be enforced against the heirs of the original ejector, appears to us quite unfounded, and the respondent's vakeel has not attempted to support it.

We reverse the order below with costs, and order that execution proceed.

The 16th February 1864.

Present:

The Hon'ble H. V. Bayley and L. S. Jackson, *Judges.*

Certificate (under Act XXVII of 1860)—Two Wills.

Case No. 345 of 1863.

Miscellaneous Appeal from an order passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 27th April 1863.

Bemola Moyee Debea (widow of Modoosoodun Chuckerbutty) *Appellant,*

versus

Kishtomonee Debea, Respondent.

Baboos Tarucknath Dutt and *Baney Madhub Banerjee* for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

Under Act XXVII of 1860 an order cannot be obtained from the Court in recognition of two wills.

Jackson, J.—This was an application in terms for a certificate under Act XXVII of

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1860; but in reality the petitioner sought for much more than she could obtain under that Act. She alleged that her deceased husband's father, Ram Nidhee, had made a will disposing of his property (consisting of lands and houses and other things) in a particular way, and that, by the operation of that will, the husband had become entitled to and possessed of the whole of that property and empowered to dispose thereof by his will. She proceeded to allege that her husband had made his will disposing of his property, and she asked the Court to grant her a certificate under that will, clearly intending that the Court should recognize and give effect to that will and constitute her the sole representative both of her husband and of the husband's father.

Other parties appeared claiming to share in the estate left by the husband's father, and the Judge gave the petitioner a certificate of representation only as to the estate of her own husband, and declaring certain other persons jointly with her entitled to a certificate for the estate of Ram Nidhee. Against this portion of the order, the petitioner Bemola appeals.

It is clear that, in her application to the Judge, Bemola contemplated something very different from the object of Act XXVII of 1860. That is an Act "for facilitating the collection of debts in successions and for the security of parties paying debts to the representatives of deceased persons," and its declared object was to enable the Zillah Courts to indicate, by the grant of certificates, the persons entitled to demand payment of debts due to deceased persons, and to protect persons who should pay such debts to the persons holding such certificates.

The application in this case said not a word of money due to Modhoosoodun, still less of money due to Ram Nidhee; and the petitioner's object manifestly was to obtain from the Court an order in recognition of the two wills, armed with which she could enter into possession of the land and property set forth in the petition.

The Judge also appears to have lost sight of the proper scope of proceedings under the Act, and to have entered upon a consideration of the manner in which the family property had been disposed of.

We think that in strictness he might have dismissed the petitioner's application, referring her to a proper application in accordance with the Act; but that in any case he ought to have cut down her petition to an application for a certificate of representation for the purpose of collecting the debts due to her deceased husband.

That portion of his order permitting the petitioner and two other persons to take a certificate as to the estate of Ram Nidhee who has been long dead was superfluous and should be withdrawn, but not for the purpose of conferring any title on the petitioner, whose appeal we dismiss. The parties who have all been proceeding under a similar perversion of the meaning of the Act may pay their own costs in these proceedings, except those in appeal.

The 16th February 1864.

Present:

The Hon'ble H. V. Bayley and L. S. Jackson, *Judges.*

Costs—Construction of decree.

Case No. 342 of 1863.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Patna, dated the 1st July 1862.

Emam Bandee Begum, *Appellant,*

versus

Syud Kufil Ali and others, *Respondents.*

Mr. G. Gregory and *Moulvie Murhumut Hossein* for Appellant.

Baboo Kissen Succa Mookerjee for Respondents.

Where a decree of the High Court dismissed an appeal with costs, except as to certain appellants who were released and to whom costs were awarded, and those appellants incurred no separate costs on account of their appeal, but took advantage of the joint appeal and joint Counsel of the other appellants,—HELD that they had nothing as costs to gain from the decree of the High Court, but that they were entitled to their costs in the Lower Court, notwithstanding a separate order for the presentation of a second petition to that Court regarding those costs, such order being held to be merely formal.

Bayley, J.—IN this case there were seven appellants to this Court. Three were farm-

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ers ; three kutkinadars ; one a purchaser from a ticcadar. The seven preferred their appeal by one petition, and were represented by one Counsel *in this Court.* In the Lower Court the kutkinadars had pleaded separately from the other defendants (appellants) and appeared by separate Counsel. In this Court the order in appeal on the 14th July 1859, p. 981, was that the appeal should be dismissed with costs, but made "one modification," namely, "in releasing the kutkinadars who are only lessees of the mortgagees, and no parties to the mortgage transaction between the principal parties. The kutkinadars will get their costs."

The Principal Sudder Ameen, in execution of this decree, had two questions before him : (1) whether *this* Court's decision covered the costs of all the appellants, and whether, therefore, the costs of the appeal ought to be divided equally according to their respective shares as amongst all the appellants ; (2) that, as there was a separate order (apparently a formal vernacular one not in the English decision of this Court) that the decree-holders should petition in the Zillah Court with reference to the costs below, the amount of those costs was therefore dependent upon a fresh order there.

The Principal Sudder Ameen decided the first question by ordering that the Sudder Court's order could only be carried out in its terms, *i. e.* by exempting the kutkinadars from their costs, and if that construction had to be questioned, it should be so here ; and the second, by decreeing that a second petition should be given in to the Zillah Court, as ordered in the vernacular decree.

There has been an appeal from this order. The contention is in fact simply that there should be a specification of the costs in appeal from which the kutkinadars should be exempted according to their shares, and that the order for a second petition for the zillah was needless, as the amount of costs below was decreed for the kutkinadars and is stated on the record.

We are of opinion that, as the kutkinadars incurred no separate costs on account of their appeal here, taking advantage of the joint petition of appeal and joint Counsel of the other appellants, they have nothing as costs to gain from this Court's order as recorded above. That order apparently regarded them as with interests separate from the other appellants, whereas, although such was the fact, they chose to appeal as if it were not so. The costs in the Zillah Court, which were separately incurred by the kutkinadars, will be paid to them by the party cast below, *i. e.* the plaintiff. The order for a petition is a mere matter of form, and does not bear the meaning put upon it below.

The Lower Court will now execute the decree in regard to costs with reference to these remarks.

The 22nd February 1864.

Present:

The Hon'ble Shumbhoonath Pundit and G. Campbell, *Judges.*

Appeal—Order under Act XIX of 1841, (as to division of property of a deceased person).

Case No. 160 of 1863.

Miscellaneous Appeal from an order passed by Mr. E. F. Lautour, Judge of Patna, dated the 23rd February 1863.

Mussamut Edoo and others, *Appellants,*

versus

Mehdee Khan, *Respondent.*

Mr. A. F. Lingham and *Baboo Kalee Kissen Mookerjee* for Appellants.

No one for Respondent.

The remedy for a party dissatisfied with an order passed under Act XIX of 1841 making a division of a deceased person's property, is by regular suit, not by appeal.

Campbell, J.—THIS is the appeal of Mussamut Edoo, the wife of Syudoodeen, complaining of an order which seems to have been passed under Act XIX of 1841, and by which the property held as belonging to the said Syudoodeen was thus divided : ¼th to Mussamut Edoo, the widow, and ¾ths to the estate of Wuzeerooddeen, the brother, since deceased. We think that the remedy for a person dissatisfied with this order is by regular suit, not by appeal, and we, therefore, dismiss the appeal.

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The 3rd March 1864.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Special Appeal (Time for preferring). —Vacations.

Case No. 3421 of 1863.

Petition praying for the admission of a Special Appeal after the prescribed time.

Kishtoproshaud Chuckerbutty, *Petitioner,*

versus

Rada Kanto Bhuttacharjee, *Opposite Party.*

Baboo Hem Chunder Banerjee for Petitioner.

The High Court refused to show indulgence to a special appellant whose time for appealing had expired by his not exercising due diligence, and intimated that the vacations were not to be added to the prescribed periods for appealing.

In this case the decision from which the petitioner seeks to appeal specially was passed on the 15th July. 90 days would expire on 13th October. On the 9th October the petitioner applied for copies of the judgment and decree, and these copies were completed on the 14th. He is therefore entitled to a deduction of 6 days, so that his time for preferring an appeal would thus expire on the 19th October.

The application of special appeal was in fact presented on the 26th November, or 38 days after the time had expired, but this Court was closed from the 19th October till the 22nd November. If therefore the application had been presented on the 23rd November, the appeal would have been safe. The delay is accounted for, and additional time asked on this ground, *viz.* that the appellant came with the decision to his vakeel Baboo Hem Chunder Banerjee one or two days before the end of the vacation, *i. e.* probably on the 20th or 21st November, to consult him as to preferring a special appeal, and that this vakeel, by a very extraordinary mistake, advised the appellant that he could take six days from the day on which the Court opened, that in consequence the appellant thought himself safe, and that otherwise he could and would have presented his petition on the 23rd.

I do not think that, under such circumstances as these, the appellant is entitled to any indulgence. He did not apply for the requisite copies until only 3 of the 90 days for appealing remained. He did not, on obtaining his copies, exercise any diligence in preparing his petition; and when he tardily went to his vakeel, the period for appeal had been already exceeded by more than a month, although, from the circumstance of the Court being closed, the appeal could not at that time have been presented.

The vacations are not periods to be added to the prescribed periods for appealing. They are only periods during which the non-presentation of appeals is excused on the ground of impossibility.

Parties therefore should be ready with their appeals in hand, to be presented immediately on the opening of the Court.

If the petitioner in the case had come to the vakeel with his application ready prepared, and the filing of it had been delayed by the vakeel's mistake, the case would be otherwise; as it is, I think he has wilfully committed default, and I must refuse to allow the further time.

The 4th March 1864.

Present:

The Hon'ble C. B. Trevor, G. Loch, and H. V. Bayley, *Judges.*

Certificate (under Act XXVII of 1860)—Representative of deceased party in a suit.

Case No. 155 of 1863.

Miscellaneous Appeal from a decision passed by the Judge of Rungpore, dated the 29th December 1862.

Olongo Moonjoree Dossee, *Appellant,*

versus

Gobindnath Sen and others, *Respondents.*

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Mr. R. T. Allan and *Baboo Poorno Chunder Mookerjee* for Appellant.

Baboos Debendro Narain Bose and *Bhuggobutty Churn Ghose* for Respondents.

A certificate under Act XXVII of 1860 is not indispensable in order to allow a party who is next heir to come in to represent a deceased party in a suit.

Bayley, J.—As I shall probably be absent from the Court when my colleagues deliver their judgments in this case, I shall leave this note of my opinion.

The question of law referred to us is whether a certificate under Act XXVII of 1860 is indispensable, in order to allow a party who is next heir to come in to represent a deceased party in a suit, there being a disputed will which the Lower Court eventually held sufficiently proved to give the executor and legatee the superior right to represent the deceased in the suit.

The Lower Court's order is not in my view shown to be illegal. I do not think that Sections 14, 15, and 16 of Act XXVII of 1860 cited to us render it imperative on a Court to refuse a party to represent a deceased party in a suit, unless he obtains a certificate under that Act. Further, the arguments addressed to us in this view are mainly in support of the judgment-debtors who have not appeared in the appeal.

If the appellant as next heir considers he should represent the deceased, he might apply for a certificate himself in due course. But he has not done so.

Loch, J. (*Trevor, J. concurring*).—The facts of the case submitted to us are as follows:—Gooroo Doss Talookdar, after having obtained a money decree against Rasmonee, died. One Dwarkanath came forward and prayed to be allowed, as executor under a will alleged to have been made by Gooroo Doss, to carry out execution of the decree. On 11th June 1862 he filed the will and examined witnesses to prove it. Subsequently the appellant, claiming to be the legal representative of Gooroo Doss, applied as his heir for permission to carry out execution. The first Court supported the will, and rejected the right of the appellant to carry on the case, and the Judge in appeal confirmed the order of the Moonsiff; and the executor upon that carried out execution.

A special appeal has been preferred on the ground that the first Court, instead of admitting the executor under the will to carry out the decree, should have suspended proceedings till one or other of the parties had obtained a certificate as prescribed by Act XXVII of 1860; that, in admitting the executor to act without having obtained a certificate, the Moonsiff acted without jurisdiction, inasmuch as he took upon himself to decide who was the party to administer to the estate of the deceased, a question which is by the law in the sole province of the Judge to decide.

The Judges* who first heard the special appeal, having differed in opinion, have sent up the case to this Bench for decision; the one Judge holding that a certificate was unnecessary; the other that where there is no dispute, or only such objection as the Court considers fraudulent and vexatious, the Court may permit the decree to be executed by the representative under Section 208. But if there is, in fact, a disputed succession, the Court cannot, under Section 208, take upon itself to decide the question of succession.

We have no doubt as to which is the more expedient course. But the question before us is whether the Moonsiff has acted illegally in permitting the executor to represent the deceased in carrying out execution of the decree, and we think he has not. We think that, under the provisions of Section 208, the Moonsiff had authority to admit the executor under the will to represent the deceased for the purpose of carrying on this suit. The effect of his order is and must be confined to this suit, and will not, of course, prevent any party who claims as heir from applying to the Judge for, and, if en-

* *Note.*—Their referring orders are not forthcoming.

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titled thereto, obtaining a certificate under Act XXVII of 1860 to administer to the estate of the deceased. Under this view of the law, we dismiss the appeal with costs.

The 9th March 1864.

Present:

The Hon'ble C. B. Trevor, G. Loch, and H. V. Bayley, *Judges.*

Appeal — Execution—Section 11 Act XXIII of 1861.

Case No. 333 of 1863.

Miscellaneous Appeal from an order passed by Mr. E. F. Lautour, Judge of Patna, dated the 18th April 1863.

Luchmun Persad, *Appellant,*

versus

Ameer Ali and others, *Respondents.*

Baboos Debendronarain Bose and *Kally Kishen Sein* for Appellant.

Mr. J. Baptist and *Moonhsee Ameer Ali* for Respondents.

An appeal does not lie under Section 11 Act XXIII of 1861 from an order in execution in which the representative of a decree-holder was on one side, and a stranger (the auction-purchaser) on the other.

This case was referred to a Full Bench by Shumbhoonath Pundit and Campbell, J. J., under the following orders:—

Shumbhoonath Pundit, J.—The Zillah Court ordered some money due to the petitioner as a decree-holder, held in deposit for him, to be given back as purchase-money to the opposite party, the auction-purchaser, whose purchase the Court considered had been set aside by a Court of Justice. Against this order the decree-holder appeals to this Court on the ground that there was no reversal of sale altogether. It was, however, pleaded against the appellant that against such an order, which is not likely to be final without a regular case under Section 11 Act XXIII of 1861, there s no appeal. As this was not a decision between two parties to the original suit in which the decree was passed in execution of which the sale in which the opposite party was the purchaser was held, there can be no appeal to this Court. This is consistent with the spirit of the decision of the Full Court in Case No. 575 of 1861, passed on the 1st of June 1862. I would accordingly reject this appeal with costs. If this plea had not intervened, I would have clearly held that the Judge was not right in paying back to the auction-purchaser, as no sale was upset.

Campbell, J.—Petitioners are decree-holders. The rights and interests of the judgment-debtors in certain property were sold in execution of decree. The purchaser paid the money into Court, and it was still there when it was alleged that the auction sale had been set aside by a decree of Court. The Lower Court, on that ground, ordered its re-payment to the auction-purchaser.

The decree-holder appears and makes it quite clear that the sale has not been set aside, but a simple decree for the property has been passed in favor of a party claiming under another right, and that a decree by consent. The purchaser took the rights and interests of the debtor whatever they were, and the order of the Lower Court is evidently wrong. The only question is whether there is an appeal, or whether we must refer the decree-holder to the circuitous process of a regular suit to recover the money wrongly paid by order of Court to the decree-holder. Certainly we should not adopt the latter course, unless the law compels us to do so. The case turns on the terms of Section 11 Act XXIII of 1861. If the case depended on the Clause, "and any other questions arising between the parties to the suit," we must probably have ruled that there is no appeal. That is decided by a Full Bench in the case No. 575 of 1861.

But, in this case, it seems to me that the matter comes within the terms of the previous Clause, "as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like," and that, under that provision, we may hear an appeal, and should reverse the order of the Lower Court.

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Full Bench Judgments.

Bayley, J.—As I shall probably be absent before my colleagues give judgment in this case, I leave this note of my opinion.

The question of law referred to us in this case is whether an appeal will lie from an order of a Judge affirming that of a Moonsiff, by which order the Lower Court held that an auction-purchaser should receive the refund of sale proceeds in execution, in preference to the representative of a decree-holder, the decree-holder himself not having taken out the money in question. I will merely briefly state that I am of opinion that no such appeal will lie. My chief reason for this view is that I do not think that the passages in Section 11 Act XXIII of 1861, cited by Mr. Justice Campbell and relied upon by him, in any way allow an appeal in a case where, as here, there is the representative of the decree-holder on one side, and *not any of the parties* on the other, but a stranger, *i. e.* the auction-purchaser.

Trevor, J. (*Loch, J. concurring*).—This matter has been referred to a Bench of three Judges in consequence of a difference of opinion between two learned Judges of the Court on the point before them.

The facts of the case are as follows :—One Deendyal Bhukut, on the 28th May 1854, obtained a decree for money against one Ameenooddeen. Execution was taken out, and certain properties belonging to the judgment-debtor attached by him. But before the sale, another judgment-creditor, one Edoo Lal, attached and sold the property in November 1859. Besides these persons, there were other decree-holders who had taken no steps to execute their several decrees. After the sale proceeds were realized, the Court ordered the proceeds to be distributed amongst the decree-holders, giving to Edoo Lal and to Deendyal the full amount of their several decrees, and dividing the remaining sum between the other two decree-holders rateably.

All the decree-holders except Deendyal took away the proceeds allotted to them, but Deendyal's share of them remained in deposit. Whilst it was in deposit, one Mussamut Gossamee and another brought a suit to reverse the sale in execution, which was dismissed ; and, whilst it was in appeal, the auction-purchasers compromised the matter, relinquishing their claims to the property which they had purchased.

The heirs of Deendyal, who had deceased, applied for the money in deposit ; the auction-purchasers opposed the application claiming the money themselves ; and the Court has determined that, as the sale was set aside by a compromise, the auction-purchasers were entitled to it. From this order an appeal has been preferred to this Court, and the question before us is, not as to the legality or otherwise of the Judge's order, for on that point there can be no reasonable doubt ; but simply whether an appeal lies to this Court in execution against that order.

Section 11 Act XXIII of 1861 enacts that "all questions regarding the amount of "mesne profits which, by the terms of the "decree, may have been reserved for adjust-"ment in the execution of the decree or of "any mesne profits or interest which may "be payable in respect of the subject "matter of a suit between the date of the "institution of the suit and execution of "the decree, as well as questions relating "to sums alleged to have been paid in dis-"charge or satisfaction of the decree or the "like, and any other questions arising be-"tween the parties to the suit in which the "decree was passed and relating to the exe-"cution of the decree, shall be determined "by order of the Court executing the decree, "and not by separate suit, and the order "passed by the Court shall be open to ap-"peal."

Now, it seems quite clear that questions regarding mesne profits and payments made in discharge or satisfaction of the decree, or the like, which are explicitly mentioned in Section 283 Act VIII of 1859, could only from their nature arise between the parties to the suit. It was, therefore, unnecessary to state this in terms. When, however, that Section was rescinded, and Section 11 Act XXIII of 1861 enacted in its stead with the addition of the general terms "any other questions," it became necessary to state explicitly the parties between whom those questions might arise. The addition, therefore, in the later enactment of the words "between the parties to the suit in which the decree was passed, and relating to the execution of the decree," did not alter the import of the terms previously used in the Section ; but the use of them had the effect of *expressly* limiting and controlling all the matters to which the Section refers, a limitation which was previously to be gathered, as we have before

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observed, solely from the nature of the questions to be determined.

Again, we think that a consideration of the whole Section above cited clearly shows that it was the intention of the Legislature that all questions arising between the parties to the suit in the course of the execution should be finally and definitively settled and determined by the Court in execution, and therefore be open to appeal; but that all questions arising between the parties to the suit and strangers should become the subject of a separate suit, and therefore not be appealable in execution.

Such being our view of the reading of the law, it seems to us that the question which has arisen on the facts of this case, can, on no legitimate interpretation of those terms, be said to be one in regard to sums alleged to have been paid in discharge or satisfaction of the decree or the like.

For the above reasons we agree with Mr. Justice Shumbhoonath Pundit in thinking that an appeal does not lie to this Court from the order of the Judge, it not being passed on any question arising between the parties to the suit in which the decree was passed. The appeal, therefore, is dismissed with costs.

The 30th March 1864.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Costs—Guardian (of minor).

Case No. 248 of 1863.

Miscellaneous Appeal from an order passed by Mr. E. F. Lautour, Judge of Patna, dated the 21st February 1863.

Luchmun Pershad, *Appellant*,

versus

Juggurnath Doss, *Respondent.*

Baboos Khetternath Bose and *Luckhy Churn Bose* for Appellant.

No one for Respondent.

Where a mother's office of guardian of her minor son had ceased when she brought a suit, and she brought a suit knowing that she had no authority to sue as guardian, and a decree was given against her personally and not against the estate of her son, she alone was held responsible for the costs.

Loch, J.—It appears that one Radha Bebee brought an action as guardian of her son Luchmun Pershad, knowing at the time that he was of age, so the Judge finds. Objection was taken on part of the defendant that, as Luchmun was of age, the suit brought by the guardian could not be heard, and plaintiff was non-suited with costs. Execution is now taken out against the property of Luchmun to realize these costs. He objects on the ground that Radha Bebee is personally liable, and that the decree for costs is a personal decree. The Lower Courts, however, have held that, as Luchmun might have derived benefit if the suit had been brought to a successful termination, he must be considered liable for the costs. We think that, as plaintiff's office of guardian had ceased when she brought the suit, and that she brought the suit knowing that she had no authority to sue as guardian, and that the decree is given against her personally and not against the estate of her son, she alone can be held responsible for the costs. We, therefore, reverse the order of the Lower Courts with costs.

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The 31st March 1864.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Section 230 Act VIII of 1859—Execution—Dispossession (by Ameen).

Case No. 498 of 1863.

Miscellaneous Appeal from an order passed by Mr. M. A. G. Shawe, Judge of Sylhet, dated the 8th August 1863.

Kasheenath Doss, *Appellant,*

versus

Bhowanee Dossee and another, *Respondents.*

Baboos Romanath Bose and *Tarucknath Sein* for Appellant.

Baboo Dwarkanath Banerjee for Respondents.

Section 230 Act VIII of 1859 is applicable to the case of a person who, though personally the defendant in the original suit, was legally other than the defendant as regards the particular portion of land in dispute in execution.

Where an Ameen was appointed to measure and give possession of land in execution of a decree, the one month allowed for preferring a claim under that Section must be calculated from the date when the Ameen gave over possession and not from the date of his final report.

Jackson, J.—The plaintiffs obtained a decree against the defendant for possession of certain entire mouzahs without specification of boundaries. In execution the Moonsiff ordered an Ameen to proceed to the spot, map and measure the lands, and thus give possession to plaintiffs. The Ameen carried out these orders, and reported having completed them on the 2nd August. The defendant, on the 13th August, objected before the Moonsiff that a certain portion of the land of which the Ameen had given possession to plaintiffs belonged to a separate mouzah which had not been in dispute in the suit, and was in his possession as proprietor of that mouzah, and applied that that land might be released to him.

The Moonsiff rejected his application. On appeal to the Judge he held that the objection of the defendant was one which came under Section 230 Act VIII of 1859; and that it had not been preferred within one month of the date on which the Ameen had measured and thereby given possession of that portion of the land to the plaintiffs, and that it could not therefore be entertained.

It is urged on appeal that Section 230 applies to persons other than the defendant; that the claimant in this matter was the defendant himself; and that the dispute should, therefore, have been heard and decided under Section 283; also that, if the defendant now preferred a separate suit, Section 283 would be quoted as barring his suit.

We think it is quite clear that, as regards his claim to the portion of land now in dispute, the appellant, though personally the defendant in the original suit, is legally other than the defendant. In the one case he claimed to be the owner of Mouzah *A*, and his claim was disallowed. He now comes into Court in another capacity as the owner of Mouzah *B*. Regarding his rights as owner of Mouzah *B*, there has been no enquiry and no decision. The Judge was therefore quite right in considering that the procedure prescribed in Section 230 Act VIII of 1859 applied to the claim preferred by the appellant.

It is then said that the date of dispossession must be reckoned from the final report of the Ameen. But here, also, we think that the Judge was quite right in calculating the one month allowed for the production of such a claim from the date on which the Ameen measured and gave over possession of the land. The circumstance that the defendant was himself the claimant, made it the more necessary that the law should be construed strictly. It is not shewn to us that the appellant raised any objection at the time the land was measured, and possession of it was given over by the Ameen.

We see no ground for interference, and dismiss this appeal.

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The 6th April 1864.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Appeal—Sale in execution—Interest.

Case No. 491 of 1863.

Miscellaneous Appeal from a decision passed by the Principal Sudder Ameen of Cuttack, dated the 18*th August* 1863.

Bishonath Doss, *Appellant,*

versus

Ahmed Ali and others, *Respondents.*

Baboos Obhoy Churn Bose and *Kissen Succa Mookerjee* for Appellant.

No one for Respondents.

Where a sale in execution was set aside, and the order directing the return of the purchase-money did not also direct the payment of interest thereon,—HELD that there was no appeal from the order of the Lower Court refusing to give interest.

Jackson, J.—THE appellant purchased the rights and interests of a judgment-debtor in certain immoveable property in execution of decree. But the sale of that property was afterwards set aside, and it was ordered that the purchaser, appellant, should receive back his purchase-money. Accordingly, orders have been passed that the amount of the purchase-money should be re-paid to appellant.

But he has also demanded interest on that money. This the Lower Court has refused, because the order directing the return of the purchase-money did not also direct the payment of interest. From that decision of the Lower Court, this appeal is preferred.

We think that no appeal lies. There is no Section of the Procedure Code which allows of such an appeal, and Section 364 lays down that no appeal shall lie from any order passed after decree and relating to the execution, except as is expressly provided in the Act.

This appeal is, therefore, dismissed with costs.

The 12th April 1864.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Appeal—Execution—Section 11 Act XXIII of 1861.

Case No. 431 of 1863.

Miscellaneous Appeal from an order passed by Mr. A. E. Russell, Judge of Moorshedabad, dated the 21*st July* 1863.

Mirza Ally Hossein, *Appellant,*

versus

Dhunput Singh and others, *Respondents.*

Mr. R. T. Allan and *Baboo Juggodanund Mookerjee* for Appellant.

Baboos Bungshee Buddun Mitter and *Romanath Bose* for Respondents.

The parties contemplated by Section 11 Act XXIII of 1861 are both the opposite parties to the suit or their representatives, but not one of the original parties divided and subsequently represented by two or more other individuals between whom a dispute may arise as to their respective shares or rights in the decree. Any order passed by the Judge in execution as between them cannot be the subject of an appeal, but their rights must be determined (as in the case of strangers) by separate suit.

Loch, J.—THE petitioner purchased a 4 anna share in a decree obtained by one Rughoonath Shah against Juggut Lall Inder Chund. The conditions of the purchase were that petitioner should, at his own expense, within one year, sue out execution, and whatever sums were realized should be rateably divided.

On a subsequent date, the original decree-holder sold his rights in the decree to one Dhunput Dhobey, who applied to the Judge to be allowed to sue out execution for the whole 16 annas. The Judge held that, under the arrangement with Mirza Ally Hossein, the applicant was entitled to take out execution for only 12 annas of the decree, and on 26th May 1863, passed orders accordingly. A review of this order was applied for, which the Judge admitted, and on 4th July held that, as Mirza Ally Hossein had not complied with the terms of his purchase, the applicant Dhunput was entitled to take out execution for the whole 15 annas. Mirza Ally Hossein applied for

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a review on the ground that the order of the 4th July last had been passed in his absence and without notice; but the Judge on the 20th July rejected the application, on the ground that the petition of review presented by Dhunput had been heard and determined in the presence of the vakeel of both parties.

An appeal has now been preferred against the order passed by the Judge on the 4th July; and the first question to be determined is whether, in such cases, any appeal will lie to this Court. It is urged by the petitioner that he and the other claimant Dhunput are both parties to the suit standing in the shoes of the original decree-holder, and consequently an appeal will lie under Section 203 of Act VIII of 1859 as enlarged by Section 11 Act XXIII of 1861. Looking, however, at the wording of those Sections, we think that the parties there spoken of are the opposite parties to the suit or their representatives, but not one of the original parties divided and subsequently represented by two or more other individuals, between whom a dispute may arise as to their respective shares or rights in the decree. The law provides for the settlement of all questions between the *opposite* parties to the suit by the Court executing the decree, subject to an appeal, and prohibits further litigation between them regarding questions arising out of the same subject matter; but parties other than the opposite parties to the suit have their remedy by a separate action, if endamaged by any order passed by the Court executing the decree, and, therefore, an appeal is not permitted to them by the Code. In the present instance, the parties before us represent one of the parties to the suit, but not the *opposite* parties. They represent parts and together make up the whole of the original decree-holder; and, as they are evidently not the opposite parties alone contemplated by Section 11 Act XXIII of 1861, we think that any order passed by the Judge in execution as between them relating to their respective rights and interests in the decree, cannot be the subject of an appeal, but their rights must be determined, as in the case of strangers, by separate suit. We hold, therefore, that no appeal lies to this Court in such a case.

It is urged that the review of the 4th July was irregularly admitted; that notice was not served on the petitioner. A decision of a Full Bench of this Court has held that the rules regarding reviews applicable to decrees of Court are applicable to miscellaneous orders. Looking at these rules, we find that the Judge has not strictly complied with the course of procedure laid down, but we do not find that the petitioner has been endamaged thereby. The application for review was heard in the presence of both parties. The point to be determined appears to have been the construction to be put upon the terms of Mirza Ally Hossein's purchase. Having come to the conclusion that, under the terms of that purchase, Mirza Ally Hossein had no right to interfere further, on which ground alone a review was admissible, the Judge, by admitting the review, had, in fact, disposed of the whole question between the parties; and if he had delayed the case and issued notice, it is difficult to see how he could have come to any other conclusion than that which induced him to admit the review. Under these circumstances we think it unnecessary to interfere with the order of the Judge, and reject the application with costs.

The 18th April 1864.

Present:

The Hon'ble F. B. Kemp and A. T. T. Peterson, *Judges.*

Appeal (Re-admission of—struck off for default).

Case No. 505 of 1863.

Miscellaneous Appeal from an order passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 23rd September 1863.

Chowdhry Ruttun Persad and others, *Appellants,*

versus

Hunooman Jah and others, *Respondents.*

Baboos Debendronarain Bose, Kally Kissen Sein, and *Anund Gopal Paulit* for Appellants.

Baboo Kissen Succa Mookerjee for Respondents.

No appeal lies from the order of a Judge rejecting an application for a review of his order dismissing an appeal for default of prosecution.

Kemp, J.—We think that this appeal must be dismissed with costs. The appeal of the appellant was dismissed for default

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of prosecution. An application to revive the appeal was made under the provisions of Section 347 of the Code of Civil Procedure, and the Judge, exercising the discretion vested in him by that Section, rejected the application to review his order, dismissing the appeal for default of prosecution. Against such an order no appeal will lie to this Court. *See* Section 387 of the Code of Civil Procedure.

The 18th April 1864.

Present :

The Hon'ble F. B. Kemp and A. T. T. Peterson, *Judges*.

Appeal (Re-admission of—struck off for default) — Issue of notice (on parties).

Case No. 544 of 1863.

Miscellaneous Appeal from an order passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 31*st July* 1863.

Ram Lall Chowdhry and others, *Appellants*,

versus

Surdaree Jah and others, *Respondents*.

Moulvie Aftaboodeen Mahomed for Appellants.

Baboo Kally Kissen Sein for Respondents.

Section 119 Act VIII of 1859 refers only to original suits, and is not applicable to the re-admission of an appeal struck off for default of prosecution.

Issue of notice on the parties, and not their pleaders, is not barred by Section 18.

Kemp, J.—We think that no appeal will lie to the Court. The suit on special appeal was remanded to the Lower Appellate Court. A notice was issued to the parties, directing them to take steps to prosecute the appeal. The appellants before us defaulted, and their appeal was struck off. They then applied under Section 347 of Act VIII of 1859, for the re-admission of the appeal. This application was rejected.

This is not a case falling within the purview of Section 119 of the Code, inasmuch as that Section refers to original suits, and not to appeals.

Another objection is taken by the pleader for the appellants, that the notice should have been served on their pleader under Section 18 of the Code ; but we think that the Court, having issued the notice on the parties, has complied with the provisions of the law. The notice on a pleader is o be presumed to be sufficient, and to have been duly communicated to the party whom the pleader represents, unless the Court otherwise direct. In this case the Court did not deem it proper to serve the notice on the pleader, but served it on the parties in person.

The appeal must be dismissed with costs and interest.

The 19th April 1864.

Present:

The Hon'ble F. B. Kemp and A. T. T. Peterson, *Judges*.

Arbitration.

Case No. 527 of 1863.

Miscellanous Appeal from an order passed by Mr. A. Davidson, Principal Sudder Ameen of Hooghly, dated the 10*th August* 1863.

Thakoor Doss Roy, *Appellant*,

versus

Hurry Doss Roy, *Respondent*.

Baboos Luckhee Churn Bose and *Mohendro Lall Shome* for Appellant.

Baboos Banee Madhub Banerjee and *Roopnath Banerjee* for Respondent.

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There is nothing in Act VIII of 1859 to prevent parties, who have a suit pending in Court, to submit the subject matter of that suit and other matters in dispute to arbitration under Section 327.

Peterson, J.—In this case Hurry Doss Roy appealed against the order of the Principal Sudder Ameen of Hooghly on an award under Section 327 of Act VIII of 1859.

A preliminary objection was taken on the ground that this Court had no jurisdiction. A case was cited by the appellant in which Messrs. Raikes and Trevor had held that an appeal did lie in such cases. The papers connected with that case were sent for, but were not forthcoming. The Court, therefore, thought it better to proceed with the case as if an appeal did lie; but they do not wish to make the present case a precedent on that point.

The vakeel for the appellant took three objections: 1*st*, that, as there was a suit pending in Court relating to some of the subject matter of reference, the parties could not proceed to an award under Section 327, but that they should have proceeded under Section 312, and obtained the leave of the Court in which the action was pending; that the whole proceedings were absolutely void, and that the award could not be upheld. 2*ndly*, that, as neither of the parties had filed a razeenamah and safeenamah in the action then pending according to the terms of the reference, the award had been virtually waived and abandoned and could not be enforced. 3*rdly*, and lastly, that the award was void on the ground of the misconduct of arbitrators, inasmuch as the three had agreed to a draft report, and that afterwards two of the three had made an award different from the draft agreed on.

With regard to the *first* objection, we are of opinion that there is nothing in Act VIII of 1859 to prevent parties who have a suit pending in Court to submit the subject matter of that suit and other matters in dispute, to arbitration under Section 327, and the objection is one as to which either of the parties to the submission are virtually estopped from making. There is nothing illegal in the parties referring the subject matter of the suit and other matters in dispute to reference, and providing that razeenamahs and safeenamahs should be filed in the suit after the award was made, more than there would be to file the razeenamahs and safeenamahs in the first instance and then referring what was the subject matter of the suit and all other matters to arbitration. We, therefore, overrule this objection.

We also overrule the *second* objection. Nothing is shown to us to satisfy us that the parties had done any act that the award was waived or abandoned.

With regard to the *third* objection, which involved the question of misconduct of the arbitrators, we are of opinion that there has been no ground of misconduct shown. The vakeel for the appellant urges several grounds of objection as to matters on which he alleges the three agreed in the draft award, and which were not followed out in the actual award. On reference to the salisnamah, it will appear that the award was to be the award of the majority, which the present is. It is not suggested that the two who made the award proceeded in taking evidence after the draft had been agreed on in the absence of the dissentient; nor is anything shown or alleged further than that the three having agreed upon a draft containing certain terms did not agree on the form of the award. On reference to the award, it will be found that, at the time of making the award by the two, the third was present and declined to sign it. The award is that of the majority, and is such under the terms of submission binding.

This appeal will be dismissed with costs.

The 25th April 1864.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Dismissal of Pleader.

Case No. 88 of 1864.

Miscellaneous Appeal from an order passed by Mr. M. A. G. Shawe, Judge of Sylhet, dated the 30th December 1863.

Grees Chunder Doss, *Appellant.*

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Baboo Mohinee Mohun Roy for Appellant.

The dismissal of a pleader, notwithstanding his honorable acquittal, was held to be illegal and contrary to the provisions of Act XVIII of 1852 and all principles of justice and equity.

It appears that the appellant, who is a pleader in the Court of the Moonsiff of Sonamgunge, Zillah Sylhet, was committed to take his trial before the Magistrate of Sylhet on a charge of attempting to bribe the Moonsiff, through a relation of his, one Russick Lall.

The Magistrate went into the case fully, and for reasons given at great length, acquitted the appellant, and committed Russick Lall, the principal witness against the appellant in the Sessions Court, for giving false evidence.

The Judge, notwithstanding this honorable acquittal, has dismissed the pleader. It appears to me that this order is wholly illegal. There is no proof of the conviction of the pleader by a competent Court of a criminal offence. On the contrary, he has been honorably acquitted by the Magistrate; and I must say, after consideration of the whole proceedings, that I fully concur in the Magistrate's view of the case. The Judge has given no reasons for his procedure in this case; and as I hold that his order is wholly illegal and contrary to the provisions of Act XVIII of 1852 and all principles of justice and fair play, I reverse it and direct that the pleader be restored to his office.

The 26th April 1864.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Appeal — Section 217 Act VIII of 1859.

Case No. 549 of 1863.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Tirhoot, dated the 19th September 1863.

Beebee Sohudra, *Appellant,*

versus

Roy Kalika Sohoy and others, *Respondents.*

Mr. C. Gregory and *Moulvie Murhumut Hossein* for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

No appeal lies from an order passed under Section 217 Act VIII of 1859 declining to issue notice as against certain alleged legal representatives of an original party.

Jackson, J.—This is an appeal from an order passed by the Principal Sudder Ameen of Tirhoot in execution of decree. Mussamut Sohudra held a decree for rupees 1,717, costs of a suit instituted against her by Munna Kooer. Munna Kooer, with Kalika and Doorga Sahaie, had also obtained a decree against Mussamut Sohudra for rupees 5,456. This amount Sohudra deposited in Court. Munna Kooer afterwards died. Sohudra then applied that Doorga and Kalika Sahaie should, as legal representatives of Munna Kooer, be served with notice of her claim to execute the decree against Munna Kooer on the money which she Sohudra had already deposited. They appeared and objected that they were not legal representatives of Munna Kooer. The Principal Sudder Ameen, for the reasons recorded by him, decided that they were not his legal representatives.

From this order Sohudra appeals, but we are of opinion that no appeal lies. The order was passed under Section 217 Act VIII of 1859, from which no appeal is allowed. The appellant's only remedy is a civil suit.

Appeal dismissed with costs.

The 27th April 1864.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Certificate under Act XX of 1841—Resignation of Guardianship and Trust.

Case No. 555 of 1863.

Miscellaneous Appeal from an order passed by Mr. A. R. Thompson, Officiating Judge of Nuddea, dated the 1st October 1863.

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Shumboo Chunder Khan, *Appellant,*

versus

Ishan Chunder Banerjee and others, *Respondents.*

Baboos Kishen Kishore Ghose and *Kalee Prosunno Dutt* for Appellant.

Mr. R. T. Allan for Respondents.

A Court cannot, solely on the petition of a party, cancel a certificate granted to him under Act XX of 1841, or declare that his trust and guardianship have ceased. If he gives up his duties of his own accord, he does so on his own responsibility, and the Court will not order him to act.

Jackson, J.—THIS appeal is presented by Shumboo Chunder Khan, to reverse a miscellaneous order of the Judge of Zillah Nudden, relative to the appellant's appointment as holder of a certificate under Act XX of 1841, to the estate of the deceased Rajkisto Khan.

Shumboo Chunder Khan and Ishan Chunder Banerjee were appointed by the will of Rajkisto guardian of his minor heirs, and in that capacity they obtained a joint certificate under the above Act. In 1860 Shumboo Chunder Khan presented a petition to the Judge, stating that he intended to act no longer as guardian or under the certificate. The only order passed was that the petition remain in the serishta. In 1863 Ishan Chunder Banerjee petitioned the Judge objecting to this petition and to the resignation of the trust by his co-guardian and trustee. The Judge, after sending for Shumboo Chunder and not being able to procure his attendance, passed an order "that he could not absolve Shumboo Chunder from his responsibilities and allow him to resign his trust."

This order is objected to in this appeal; but we cannot see that it is in any way injurious to the appellant. It is said to have been passed three years after the appellant's petition was given in. This may be, but the order is quite correct. The Court could not solely on a petition cancel the certificate of the appellant or declare that his trust and guardianship had ceased. If the appellant gives up his duties of his own accord, he does so on his own responsibility, and the Court will not order him to act. He will, on this question, act or not on his own responsibility. The appellant shows us that the purwanna issued by the Judge in his name, consequent on the decision in this case, does almost order him to act. That part of the purwanna is cancelled.

The appeal is dismissed.

The 27th April 1864.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Appeal—Section 230 Act VIII of 1859.

Case No. 524 of 1863.

Miscellaneous Appeal from an order passed by Syud Ahmed Buksh, Principal Sudder Ameen of Sylhet, dated the 24th September 1863.

Khellut Chunder Ghose, *Appellant,*

versus

Prosunnomoye Dossee, *Respondent.*

Mr. R. T. Allan for Appellant.

Baboo Anund Gopaul Paulit for Respondent.

There is no appeal from an order passed under Section 230 Act VIII of 1859 rejecting an application by a person not a party to the suit, alleging that he is being dispossessed by the Court Ameen in execution of decree.

Loch, J.—THIS is an appeal to set aside an order passed under Section 230 Act VIII of 1859, rejecting the application of the petitioner, who is not a party to the suit, alleging that he is being dispossessed by the Court Ameen in execution of the decree. The law directs that the Court, after examining the applicant, shall, if there appears to be probable cause for making the application, number and register the petition as a suit between the applicant as plaintiff, and the decree-holder as defendant, and proceed to investigate the case as a regular suit, and an appeal will lie under Section 231 from the decision passed; but if the Court reject the application, on the ground that there is no probable cause, without numbering and registering it, there does not appear to be any appeal from such order.

Looking at the statement of the case as set forth in the order of the Principal Sudder Ameen rejecting the petition, we think there certainly was a probable cause, sufficient to warrant the admission of the application. As, however, the law does not permit of an appeal to this Court in claims so rejected, we think the only course for the petitioner to take, is to apply to the Court below for a review of its judgment, or a civil uit.

Appeal rejected with costs.

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The 4th May 1864.

Present:

The Hon'ble G. Loch and F. B. Kemp, *Judges.*

Certificate (under Act XXVII of 1860)—Marriage and Legitimacy.

Case No. 504 of 1863.

Miscellaneous Appeal from an order passed by Mr. E. F. Lautour, Judge of Patna, dated the 19*th August* 1863.

Mr. Taylor, general attorney for Shaik Rohimoollah, *Appellant,*

versus

Mussamut Nundee Jan, *Respondent.*

Mr. R. T. Allan for Appellant.

No one for Respondent.

On an application for a certificate of administration under Act XXVII of 1860, where the applicant claimed as heir of the deceased and impugned his marriage,—HELD that the Judge was bound to enquire summarily into the question of the marriage of the deceased and the consequent legitimacy of his children.

Kemp, J.—WE think that the Judge was clearly wrong in refusing to enquire summarily into the question whether the marriage of Wuzeerooddeen and the consequent legitimacy of his children has been established or not. On an application for a certificate of administration under the provisions of Act XXVII of 1860, he was bound to make such enquiry, and the more so as the applicant claimed as heir of Wuzeerooddeen and impugned the marriage. Any decision passed is of course open to an appeal or to a regular suit, but the Judge's hands are not, as he supposes, tied.

We remand the case for a summary enquiry on the points raised.

The 4th May 1864.

Present:

The Hon'ble G. Loch and F. B. Kemp, *Judges.*

Appeal — Orders under Act XX of 1863—Religious Endowments.

Case No. 456 of 1863.

Miscellaneous Appeal from an order passed by Mr. E. F. Lautour, Judge of Patna, dated the 16*th September* 1863.

Khudeeram Singh, *Appellant,*

versus

Sham Singh Poojoory, *Respondent.*

Mr. J. Baptist for Appellant.

Moulvie Murhumut Hossein for Respondent.

An appeal does not lie from an order passed under the Religious Endowments Act XX of 1863, but the party dissatisfied with the order may seek to set it aside by a regular suit.

Loch, J.—THIS is an order passed under Act XX of 1863. That law does not permit of an appeal, but the party may seek to set aside the order by a regular suit. It is urged that, under Act XXIII of 1861 which provides that in miscellaneous cases the course prescribed by Act VIII of 1859 should be followed, an appeal is admissible. We do not, however, think the law quoted is applicable, nor that the miscellaneous cases therein referred to are orders passed under Act XX of 1863. We reject the petition with costs.

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The 6th May 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Certificate (under Act XL of 1858).

Case No. 27 of 1864.

Miscellaneous Appeal from an order passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 15th December 1863.

Mahomed Saleh, *Appellant,*

versus

The Government, *Respondent.*

Mr. T. T. Forbes and *Moonshee Ameer Ali* for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

It is not the policy of Act XL of 1858 to prevent parties from performing their natural duties by the younger members of their family who may be deprived of their natural parents; and it should not be considered as an axiom that an uncle or other near relative will necessarily defraud a minor, and ought therefore to be refused a certificate under that Act.

Loch, J.—THIS is a petition to reverse the order of the Judge refusing to allow the petitioner, who is uncle to the minor Mahomed Khuleel, to take charge of the estate left by the minor's deceased father, and praying that a certificate under Act XL of 1858 may be given him.

The petitioner makes a similar application in the case of another nephew Dost Mahomed, son of a deceased sister.

The Judge has refused to give the certificate, but has assigned no sufficient grounds for so doing. He appears to have come to the determination on petition presented by the Government vakeel, which appears to the Court to have been most uncalled for, and which that officer should not have been allowed to present, unless he had means of supporting the doubts and suspicions he raises in that petition.

It appears that the family consisted of two brothers, Mahomed Ismael and Mahomed Saleh, and two sisters who were in the joint possession and enjoyment of the property made over to them by their mother who is still alive. Mahomed Ismael and one of the sisters are dead. Mahomed Khuleel is the son of the former, Dost Mahomed of the latter. There is no charge against Mahomed Saleh's character. The family have lived together in harmony to the present time, and he is said to have been the manager. The other members of the family have no objection to his having charge of the estate, and there is really no good reason why he should not be allowed to manage the family property without the interference of a stranger. From the wording of Act XL of 1858, it is evidently not the policy of the law to prevent parties from performing their natural duties by the younger members of their family who may be deprived of their natural parents; and it should not be considered as an axiom that an uncle or other near relative will necessarily defraud the minor. Without some good reason, such a slur should be cast on no man's character. The Judge, should any thing go wrong hereafter, will always have it in his power to recall the certificate and call the manager to account. We reverse the order of the Judge, and direct that the certificate under Act XL of 1858 be given to the petitioner. The Judge will appoint the grandmother or some other suitable person guardian to the minor.

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The 6th May 1864.

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Limitation—Execution—Section 21 Act XIV of 1859—Act XI of 1861.

Case No. 18 of 1864.

Miscellaneous Appeal from an order passed by Moulvie Syud Sukhawut Hossein Khan, Principal Sudder Ameen of Patna, dated the 2nd December 1863.

Baboo Roghoonath Persad (Judgment-debtor) *Appellant,*

versus

Mussamut Velaettee Begum and others (Decree-holders) *Respondents.*

Baboos Unnoda Persad Banerjee and *Lukhee Churn Bose* for Appellant.

Baboo Kishen Kishore Ghose for Respondents.

According to Section 21 Act XIV of 1859, the application for execution must be made within three years from the time of the passing of the Act, and not from the time of its coming into operation, Act XI of 1861 notwithstanding.

Loch, J.—APPLICATION for a decree passed on 5th June 1855 was made on 12th September 1862. The Principal Sudder Ameen, after calling for the usual report from his office, which was supplied on 10th November 1862, passed an order in the absence of the judgment-debtor on 6th December 1862, to the effect that, under the provisions of Section 2 Act XI of 1861, the application was within time, twelve years not having expired since the date of the decree, and he ordered notice to be served.

It is pleaded before us that the suit is barred by limitation, no act to keep alive the decree having been done for more than three years previous to the passing of Act XIV of 1859.

By Section 20 Act XIV of 1859 it was declared that no process of execution to enforce any judgment, decree, or order of a Civil Court should issue unless some proceeding shall have been taken to enforce such judgment or to keep the same in force within three years *next preceding* the application for such execution. And Section 21 provided that nothing in the previous Section should apply to any judgment, &c., *in force at the time of the passing of the Act*, but process might be issued either within the time now limited by law (*i. e.* 12 years) or within three years *next after the passing of this Act whichever shall first expire.*

The Act XIV of 1859 was passed on the 5th May 1859, so that the three years prescribed by Section 21 expired on 5th May 1862. Act XI of 1861 suspended the operation of Sections 19 to 23 to the 1st day of January 1862, but it did not alter the wording of Section 21. Indeed, the peculiar wording of that Section, *viz.* "*after the passing of the Act*" and its effect were perhaps overlooked. The effect, however, has apparently been that parties having decrees in the predicament described in Section 21, *i. e.* in force at the time of the passing of the Act, considered that, as the operation of this and other Sections had been suspended till January 1862, limitation would begin to run against them, not from the time of the *passing of the Act*, but from the time of its coming into operation. Act XI of 1861, however, does not say so. The words of the law are distinct, and the suspending Act did not alter them. As, therefore, no application for execution was made within *three years from the passing of Act XIV of* 1859, we think the application now made to the Principal Sudder Ameen for the execution of this decree is out of time, and that it cannot be enforced. We, therefore, reverse the order of the Lower Court and decree the appeal with costs.

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The 6th May 1864.

Present:

The Hon'ble G. Loch and F. B. Kemp, *Judges.*

Sale of decree — Appeal — Suit — Section 104 Act X of 1859.

Case No. 2 of 1864.

Miscellaneous Appeal from an order passed by Baboo Ram Kristo Roy, Deputy Collector of Mymensingh, dated the 3rd October 1863.

Bunshee Mohun Doss and others (Judgment-debtors) *Appellants,*

versus

Huro Chunder Doss Chowdhry and others (Decree-holders) *Respondents.*

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Appellants.

Baboos Sreenath Doss and *Kishen Dyal Roy* for Respondents.

A decree held to be a part of a judgment-debtor's effects and not to fall under the head of immoveable property.

No appeal lies to set aside a sale of a decree under Act X of 1859, the only remedy being by regular suit as prescribed by Section 104.

Loch, J.—This is an appeal to set aside a sale of moveable property made in execution of a decree under Act X of 1859. Certain irregularities in the mode of conducting the sale are pleaded; but the opposite party takes this objection in bar of hearing the appeal that no appeal is allowed under the Act, and the only remedy for petitioner is by suit as prescribed by Section 104.

On the part of the petitioner it is urged that the property cannot be sold in execution, for it does not properly come under the head of moveable. It is a decree and incorporeal. Such property might be sold under Act VIII of 1859, or under decrees of the Small Cause Courts, but not under the Rent Law; and Sections 232 to 237 of Act VIII are read to us to show that property such as this is not available for the liquidation of decrees for rent. But the object of the Sections quoted is not to point out any distinction between one kind of moveable property and another, but to show how such property is to be dealt with according as it is in the custody of the defendant, or of a third party, or burdened with a lien or not immediately available. But the law, Act X of 1859, raises no such nice distinctions as are now attempted to be made. It declares that, in execution of a decree (Section 86), process may be issued against either the person or property of a judgment-debtor. It then divides property into two classes, moveable and immoveable, and it provides (Section 87) that, if a creditor be unable to furnish a list of property to be attached, he may apply for a general attachment of the debtor's effects. We think that the decree which has been attached in this case, must be considered a part of the debtor's effects, and it certainly does not fall under the head of immoveable property. The only course open to the petitioner is by regular suit as prescribed by Section 104. We dismiss the appeal with costs.

The 16th May 1864.

Present:

The Hon'ble G. Loch, *Judge.*

Appeal—Filing of judgment and decree in analogous cases.

Case No. 728 of 1864.

Lowazima Special Appeal from a decision passed by the Judge of Rajshahye, dated the 10th December 1863, *affirming a decision passed by the Deputy Collector of that District, dated the 30th June* 1863.

Bhyrubnath Sandyal (Plaintiff) *Appellant,*

versus

Huro Soonduree Dossea (Defendant) *Respondent.*

Baboo Debendro Narain Bose for Appellant.

No one for Respondent.

Where the parties in two or more suits are the same, and the decision in one case governs all the cases, the filing of copies of the judgment and decree passed in the principal case is a sufficient compliance with the law.

Loch, J.—Where the parties in two or more suits are the same, and the decision in one case governs all the cases, then, if the appellant file copies of the judgment and decree passed in the principal case, this may be considered a sufficient compliance with the law; but if the parties in each case be different, it is not sufficient for the appellant to refer to a case with which he has nothing to do, and to say that the judgment of the Lower Court in that case governs his, and that it has been filed by another appellant with whom he has no privity. Application rejected.

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The 8th June 1864.

Present :

The Hon'ble W. Morgan and Shumboonauth Pundit, *Judges.*

Review of judgment.

Case No. 177 of 1864.

Miscellaneous Appeal from an order passed by Mr. A. Pigou, Judge of Hooghly, dated the 15th March 1864, setting aside an order of the Additional Principal Sudder Ameen of that District, dated the 30th January 1864, refusing to cancel a previous order striking off a case from his file.

Golam Esha, *Appellant,*

versus

Hurrish Chunder Mookerjee, *Respondent.*

Baboos Hem Chunder Banerjee and *Romesh Chunder Mitter* for Appellant.

Baboo Greesh Chunder Ghose for Respondent.

A Judge cannot, by transferring a case to his own file, confer on himself the power to review an order of dismissal pronounced by a Principal Sudder Ameen.

Morgan, J.—ORDINARILY, the Court which passes the decree is the only Court competent to grant a review of judgment. In the present case the Judge could not, by transfer of the suit to the files of his own Court, confer on himself the power to review the order of dismissal pronounced by the Principal Sudder Ameen; and his proceeding (which, although it purports to be by way of review, is in the nature of a hearing on appeal) is one in excess of his jurisdiction, which we are empowered to correct under the 35th Section of Act XXIII of 1861. We shall call for the record and set aside the decision.

The Principal Sudder Ameen's order of dismissal was an order terminating the suit; and inasmuch as the plaintiff was precluded by the Law of Limitation from instituting a fresh suit, it was a definitive order, disposing, at once, of the particular suit and of all remedy by suit. It was a decretal order which was, in our judgment, open to appeal. If the case is one in which injustice has been done, it may be set right by an appeal from this order, to be preferred to the Judge. The usual time of appeal has long since elapsed; but the Appellate Court has power, (under Section 333 of the Code of Civil Procedure) to entertain the appeal, if the appellant shows sufficient cause for not having presented his memorandum of appeal within the limited period. If the long delay which has occurred can be accounted for satisfactorily (either by reason of the irregular proceedings so long pending in the Principal Sudder Ameen's Court, or otherwise), the propriety of the order of dismissal may still be considered by the Judge in the form of an appeal.

We shall call for the record under the Section to which we have referred.

The order upon the present appeal must be that it be rejected, each party bearing his own costs.

The 9th June 1864.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble F. B. Kemp, *Judge.*

Sale in Execution — Rights of purchaser.

Miscellaneous Appeal from an order of the Principal Sudder Ameen of Burdwan, dated the 6th May 1864, setting aside a sale in execution of decree.

Madhub Chunder Dutt, *Appellant,*

versus

Joy Kissen Mookerjee, *Respondent.*

Mr. W. A. Montriou for Appellant.

No one for Respondent.

Semble.—A purchaser at a sale in execution of a decree has no greater rights than a purchaser under a decree in Chancery whose rights are liable to be defeated by a re-opening of the biddings by order of the Court.

Norman, C. J.—THE plaintiff having obtained a decree for Rs. 1,772 for costs against Joy Kissen Mookerjee, a certain putnee talook belonging to the execution-debtor was attached, sold in execution of the decree, and purchased by the decree-holder at Rs. 3,200, a price which was greatly below its real value, which, in fact, was said to be from Rs. 40,000 to Rs. 50,000. Within the time limited by Section 256, the execution-debtor applied to the Principal Sudder Ameen to set aside the sale on various grounds, and amongst others, that the decree-holder had not made proclamation by beat of drum on the day of sale, and that the decree-holder fraudulently took with him two men and got the property sold at a low price. The Principal Sudder Ameen set aside the sale on the grounds, *first,* that the proclamation was not published in every part of the city, which, he said, he was informed was usual; and, *secondly,* that the decree-holder had fraudulently got the property bought in at a low price, of which, however, there appeared to be no real evidence.

Mr. Montriou applied to the Court and prayed that, though no appeal lies under Section 257, we would pass an order in exercise of some extraordinary jurisdic-

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tion under Section 15 of the Act constituting the High Court, or direct a new one to be held in strict conformity with Sections 256 and 257 of Act VIII of 1859.

We are disposed to assent to his argument, and for the purposes of our present decision take it for granted that the judgment of the Principal Sudder Ameen was erroneous. But from that judgment, Section 256 gives no appeal. The order setting aside the sale is final: and though, if we saw that injustice had been done and that the case had not really been disposed of under the Section in question, we might have directed the Principal Sudder Ameen to take it up again and dispose of it under the provisions therein contained, upon the principle that we could compel him to exercise his jurisdiction if he had omitted to do so. We think we ought not to interpose in the present case, while, in fact, the object of the execution is not defeated by the order which has been passed. It is not shown that the execution-creditor is in any danger of losing his money. He can re-attach the property if he thinks fit; and although the rights of the purchasers have been strongly pressed upon us, their rights do not become absolute till the confirmation of the sale. Till that time, the purchaser has, perhaps, no greater rights than a purchaser under a decree in Chancery, whose rights are liable to be defeated by a re-opening of the biddings by order of the Court. Be that as it may, it seems to us that the Legislature, by taking away the right of appeal, has thought fit to relieve us from the duty of protecting such rights. We therefore reject the application.

The 27th June 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Sale in Execution—Deposit.

Case No. 47 of 1864.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Beerbhoom, dated the 3rd of December 1863.

Chulkoo Dutt Jha, *Appellant,*

versus

Raja Leelanund Singh and others, *Respondents.*

Baboos Juggadanund Mookerjee and *Roopnath Banerjee* for Appellant.

Moonshee Ameer Ali for Respondents.

At a sale in execution of a decree, when the sale o any lot is completed, the purchaser should then an there be required to make the deposit prescribed b Section 253 Act VIII of 1859; failing which, the lo should at once be put up to sale at the risk of the firs purchaser. The decree-holder, if the party to whom the lot is knocked down, is equally bound to make th prescribed deposit as any other auction-purchaser.

Loch, J.—THE circumstances of this case are as follows:—Rajah Leelanund Singh, in execution of a decree against Ishuree Nund Dutt Jha, attached and caused the sale of certain properties belonging to the defendant and bid for them himself, and the lots were knocked down to him at an aggregate sum of rupees 18,983. On being called upon to pay the fees and deposit money he offered his receipt and deposit at the rate of rupees 6-4 per cent. which the Ameen refused to accept. The Ameen, therefore, considering the sale cancelled, put up the lots again on 6th Assar 1270 (19th June 1863) two days after the first sale, and in the absence of the decree-holder's agent sold them to Chulkoo Dutt Jha for rupees 1,565. As this proceeding rendered the decree-holder liable to make good the difference between his bid and that of the second purchaser without deriving any benefit to himself, he filed objections to the sale; and the Principal Sudder Ameen, considering the sales in both cases to have been irregularly carried on, set them aside, and ordered a fresh sale to take place.

The second purchaser, Chulkoo Dutt, appeals from this order, but a preliminary objection to hearing the appeal under Section 257 of Act VIII of 1859 is taken; and we think the objection valid, and that, as the Lower Court has set aside the sale upon grounds, the sufficiency of which it alone was competent to consider and deal with, no appeal lies to this Court; and, therefore, we reject the present application with costs.

We observe, in conclusion, that the Principal Sudder Ameen is quite correct in the view he has taken as to the mode in which the sale of several and separate lots should be conducted. When the sale of any lot is completed, the purchaser should then and there be required to make the deposit prescribed by Section 253, and, failing to do so, the lot should at once be put up to sale at the risk of the first purchaser. We would observe, also, that the law gives no preference to the decree-holder above any other auction-purchaser. All who bid at a sale are on the same footing; and the decree-holder, if the party to whom the lot is knocked down, is equally bound to make the prescribed deposit as any other auction-purchaser.

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The 4th July 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Decree—Execution—Suit.

Case No. 34 of 1864.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Bhaugulpore, dated the 30th of September 1863.

Raja Leelanund Singh, *Appellant,*

versus

Banee Madhub Singh, *Respondent.*

Moonshee Ameer Ali for Appellant.

No one for Respondent.

A regularly executed decree cannot be over-ridden or annulled by a Miscellaneous petition. If the judgment debtor wishes to proceed against the decree-holder, he must do so in a regular suit.

Glover, J.—The circumstances of this case are briefly these. Petitioner sued the heirs of one Tofanee Singh for possession of land with mesne profits, including in the action Banee Madhub, the party to whom the land had been leased.

Tofanee was supposed by petitioner to have three sons only, and against these three and Banee Madhub a decree was eventually obtained. On execution being taken out, however, three other sons started up and objected to the execution proceeding against their shares of their father's property, they having been no parties to the original suit.

The Principal Sudder Ameen held that all the property being Tofanee's ancestral estate was liable for his debts; but on appeal to this Court, the Principal Sudder Ameen's order was reversed on the ground that the claimants had not been included in the decree. An application for review of judgment was refused.

Banee Madhub now comes into Court, and claims a share of the wasilat which has been released to the three sons of Tofanee aforesaid. The Principal Sudder Ameen first rejected, but afterwards on a review of judgment admitted the petition, and gave Banee Madhub what he wanted.

Against this order the decree-holder appeals to this Court, urging—

1*st.*—That Banee Madhub was included in the decree, and is, therefore, entitled to no share of the released property; and

2*nd.*—That the theekadar consented to that decree, and cannot now overset its provisions against himself by a miscellaneous order: if he is dissatisfied, he must bring a regular suit.

Both of these objections appear to us valid. Banee Madhub was a judgment-debtor as much as any of the others. He, moreover, consented to the decree and paid his quota of the wasilat. It may be that he has an equitable claim against the other three sons of Tofanee, the present decreee-holders, but a regularly executed decree cannot be overridden and annulled by a miscellaneous petition; and Banee Madhub, if he wishes to proceed against the decree-holders, must do so in a regular suit.

The appeal is, therefore, decreed, and the Lower Court's order reversed with costs.

The 5th July 1864.

Present:

The Hon'ble Sumbhoonath Pundit and F. A. Glover, *Judges.*

Review—Appeal.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Behar, dated the 17th April 1862, *affirming an order passed by the Moonsiff of that District, dated the 10th September* 1860.

Rash Beharee Singh and others (Plaintiffs) *Appellants,*

versus

Koonj Beharee Singh and others (Defendants) *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

No one for Respondents.

The mere preferring of an appeal against a judgment does not bar the admission of a review of that judgment.

Pundit, J.—The applicant applies to this Court against the order of the Lower Appellate Court refusing to receive his petition for review, on the ground that he had already appealed specially to this Court.

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If the special appeal, as the petitioner represents, has been rejected by this Court, the mere fact of that appeal being preferred to this Court does not appear to be any bar (as supposed by the Lower Court) to the admission of a review by the said Lower Appellate Court, if there be no other objection of time, &c., against its admission.

The petitioner may appear before the Lower Appellate Court with a copy of this order, and the copy of his petition to the Lower Court filed by him is to be returned in the usual manner.

The 8th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Interest—Execution of decree.

Case No. 522 of 1863.

Miscellaneous Appeal from an order passed by Mr. J. C. Dodgson, Judge of Mymensingh, dated the 31st August 1863.

Dwarkanath Sandial and others (Decree-holders) *Appellants,*

versus

Purmeshur Sing (Judgment-debtor) *Respondent.*

Baboos Sreenath Dass and *Kishen Dyal Roy* for Appellants.

Baboo Gopal Lall Mitter for Respondent.

Held, with reference to the circumstances of the case, that there was no such neglect on the part of the decree-holder in executing his decree as to justify the amount of interest claimable under the decree being limited to the original sum due as principal.

Jackson, J.—The question raised in this appeal is regarding the extent to which the judgment-debtor is liable for interest. The Judge being of opinion that the decree-holder had evinced great neglect in enforcing the execution of his decree has, on the rule laid down in the S. D. A. Reports for 1858, page 1342, limited the amount of interest claimable under the decree to the original sum due as principal. It is contended before us that the Judge is altogether wrong in the facts upon which he considers the neglect to be proved, and is not, under the actual circumstances of the case, warranted in limiting the amount of interest which, by the decree, was to be paid until the principal was paid.

There is no doubt that the Judge is altogether in error in his facts, and particularly in the important point of dates. He says that the decree was obtained in 1838, and that up to the date of death of the decree-holder in 1852, a period of 14 years, he neglected his right of enforcing the decree. The facts are—that the decree-holder died before, or in 1845, in which year we find his widow, as guardian for her minor son, carrying on the decree. We find also that in 1842 the decree-holder had enforced his decree to the extent of attaching the judgment-debtor's landed estate, and only refrained from selling on an express agreement being entered into by the judgment-debtor to pay within a year. In 1860, the son, the present appellant, came of age, and at once executed the decree. He was then met by the judgment-debtor with the plea of payment and of limitation. The first plea was found to be false, and the second rejected. We think that, looking to all these circumstances, there has not been any such neglect on the part of the decree-holder as to require the Court to exercise the discretion, which it was held in the precedent of the 8th July 1858 it possessed, to limit the amount of interest due under the decree. It was the duty of the judgment-debtor to pay up the sum due from him, and he knew very well that interest would be ordinarily due from him for every day until he did pay the sum decreed. His false plea of payment is one which deprives him of any consideration on the part of the Court. We should, therefore, on the facts, be more inclined to put in force the rule laid down in the S D. A. Reports for 1860, page 93, than that in the Reports for 1858, above alluded to.

In this case the decree distinctly awards interest to date of payment of principal. It is doubtful whether the precedent of 7th July 1858 would apply to such a decree. However this may be, we think the judgment-creditor in this case is liable to the full interest claimed, and therefore reverse the decision of the Judge and award to the appellant interest to date of payment of principal.

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The 8th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Inheritance—Ancestral Debts—Liability of Heirs.

Case No. 540 of 1863.

Miscellaneous Appeal from an order passed by Mr. E. F. Lautour, Judge of Patna, dated the 5th October 1863.

Mussamut Joomai, *Appellant,*

versus

Wahid Ali, *Respondent.*

Mr. C. Gregory for Appellant.

Moonshee Ameer Ali and *Mr. J. Baptist* for Respondent.

The liability of an heir for the debts of his ancestor extends only to the extent of the inheritance which he has received. If he has waived all his rights to the inheritance, his property acquired *aliunde* is not liable.

Jackson, J.—The appellant was defendant in a suit for possession of certain landed estates and for mesne profits, brought by one Wahid Ali against Waris Ali, and on his death against his heirs, of whom Mussamut Joomai was one. Wahid Ali obtained a decree, and in execution Mussamut Joomai's personal estate has been attached. She objected before the Judge that, although she was heir of Waris Ali, as being his daughter, she had not inherited any of his property, and that, consequently, she was, if liable at all, only liable to the extent to which the decree-holder could prove that she had received property belonging to her late father.

The Judge held that, under the decree, she was liable for her share of the mesne profits, as being one of the heirs of Waris Ali.

It is now on appeal again contended on her behalf that, as she did not inherit any of the late Waris Ali's property, and as she did not receive any of the mesne profits, whereas Mirza Hossein, her brother and the son of Waris Ali, admitted that he had taken the whole estate and received all the profits, she, Mussamut Joomai, was liable only to the extent to which it could be shewn that these statements were incorrect.

There is no doubt that Mussamut Joomai from the first contended that she had waived her right of inheritance to her father. She raised objections to the decree for mesne profits passed on appeal against her in a petition for review of that decree on this ground; but her application was rejected because she had not required any issue to be raised on this question, and had not brought the question to the notice of the Court on appeal, and because it was too late to re-open the whole suit to decide this question. We think, however, that Mussamut Joomai is not liable for these mesne profits except to the extent that she may have received them, or to the extent that she may have inherited other portions of her father's property, and that if it can be shewn that she did give up her rights as heir to her father, and did not take any of her inheritance, her personal estate, inherited from her husband, should not be attached under the decree. We therefore amend the decision of the Judge, and declare Mussamut Joomai's liability under the decree, as one of the heirs of Waris Ali, to extend only to such property as she may have inherited or received as such heir. Each party will pay his own costs of this appeal.

The 20th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Arbitration—Appeal.

Case No. 110 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 7th of December, 1863.

Ram Coomar Chowdhry, *Appellant,*

versus

Nobin Chunder Chowdhry, *Respondent.*

Baboos Sreenath Doss and *Mohendro Lall Shome* for Appellant.

Baboo Obhoy Churn Bose for Respondent.

A regular (and not a summary) appeal lies to set aside an award of arbitrators passed under Section 313 Act VIII of 1859.

Bayley, J.—In this case the appeal is against an award of arbitrators appointed under Section 313 of Act VIII of 1859.

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The plea taken is that the award is not in legal form; it is therefore no award and null, and consequently the Judge had nothing under the law referred to with which to deal, and that thus his action is to be summarily set aside.

The opposite party raise a preliminary objection to the effect that no such summary appeal will lie; that a regular appeal should have been brought to set aside the award if the appellant objected to it either on the grounds stated or upon any other grounds. The decision of Mr. Justice Loch and Mr. Justice Norman, dated 22nd December 1863, is cited in support of this view.

We quite concur in the view taken in that judgment, and think that only a regular appeal will lie. The point seems to have been decided only within a few months, and therefore we will allow 25 days for the filing a regular appeal subject to the same conditions as if the appellant had done so in proper time and without prejudice to the right of the respondent to contend that no such appeal will lie at all.

This miscellaneous appeal will be dismissed with costs.

The 20th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Pro forma defendant—Appeal.

Case No. 125 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 11th December 1863.

Deokeenundun Roy and another, *Appellants,*

versus

Kalee Pershad and others, *Respondents.*

Baboo Otool Chunder Mookerjee for Appellants.

Baboo Kissen Sukha Mookerjee for Respondents

A *pro formâ* defendant cannot be allowed to raise in appeal objections which he neglected to raise in the suit.

Jackson, J.—This is an appeal from an order of the Judge in execution. The appellant urges that he is not bound by the special terms of the decree, as he was only a *pro formâ* defendant in the case.

We think that the special reason for making persons *pro formâ* defendants is that they may raise any objections if their rights are in any way jeopardized by the claim of the plaintiff, and that as the appellant, being thus a party, did not then in the suit raise the objections which he now does, he cannot now be heard. He is bound by the decree which declares that the decree-holder shall receive the surplus sale proceeds deposited in the Collectorate, and he cannot now prevent their payment to plaintiff.

Appeal dismissed with costs.

The 21st July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Lunatics—Section 29 Act XL of 1858—Civil Court (meaning of).

Case No. 81 of 1864.

Miscellaneous Appeal from an order passed by the Officiating Judicial Commissioner of Assam, dated the 14th of December 1863.

Kaleeka Pershad Bhuttacharjee, *Appellant,*

versus

Dhukhina Kally Dabee, *Respondent.*

Baboos Tarucknath Sein and *Mutty Lall Mookerjee* for Appellant.

Baboo Obhoy Churn Bose for Respondent.

The Court of the Judicial Commissioner of Assam is the *Civil Court* contemplated by Section 29 Act XL of 1858.

Bayley, J.—In this case the mother-in-law of a lunatic applied to have charge of the estate; the uncle also applied. The Deputy Commissioner of Kamroop granted the petitioner's application. The Judicial Commissioner, on appeal, disallowed it, and ordered that, under Section 10 Act XXXV of 1858 the Deputy Commissioner should appoint a fit person to be manager of the estate and guardian of the person of the lunatic.

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Against this order the uncle appeals, and urges that by Section 29 Act XL of 1858 the Deputy Commissioner had no jurisdiction.

We observe by that Act that the expression "Civil Court" as used "in this Act shall be "held to mean the Principal Court of Origin-"al Jurisdiction in the District." Now, such a Court in a Regulation District is the Zillah Judge, and by the Government Order, page 1133, 28th May 1864, "the powers of a Zillah Judge shall be exercised by the Judicial Commissioner." It is true that the order is for carrying out the provisions of Acts VIII and X of 1859. But the provisions of Act VIII of 1859 form the basis of the whole Civil Procedure, and regulate the general conduct of Civil Courts. Thus, the Judicial Commissioner's, in our view, is the Civil Court contemplated by Section 29 Act XL of 1858. As we have before us the decision of the Judicial Commissioner, and it is from that alone we have an appeal, we see no want ot jurisdiction, and overrule this objection.

Looking at all the facts stated by the Judicial Commissioner, we consider his order, under all the circumstances, a fit and proper and legal order; and, seeing no good reason to interfere, we reject the application.

The 21st July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Section 210 Act VIII of 1859—Execution (against representatives)—Appeal.

Case No. 114 of 1864.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Sarun, dated the 31st of December 1863.

Syed Lootfur Ali Khan, *Appellant,*

versus

Sadda Brut Pershad and others, *Respondents.*

Baboo Mohendro Lall Shome and *Moulvie Murhumut Hossein* for Appellant.

Mr. R. T. Allan for Respondents.

No appeal lies from an order passed under Section 210 Act VIII of 1859, refusing application of decree-holder to execute decree against the legal representatives of the person against whom the decree was passed.

Jackson, J.—THIS is an appeal from an order in execution of a decree.

The decree-holder sought to execute his decree against the legal representatives of the person against whom the decree was passed. But the Court did not think proper to grant the application, and rejected it, as, under Section 210 Act VIII of 1859, it had full power to do.

This order is appealed from, and the appeal is said to be admissible for hearing under Section 11 Act XXIII of 1861. But that Section alludes only to questions between the parties to the original decree and not to questions arising between the decree-holder and the debtor's alleged representatives who were not present at the decree and whose claim to represent him has been rejected.

The order of the Court under Section 210 is not declared open to appeal by any Section of Act VIII of 1859 or Act XXIII of 1861, and is therefore not capable of being appealed under Section 264 Act VIII of 1859.

This appeal is rejected with costs.

The 21st July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Section 11 Act XXIII of 1861—Execution—Appeal.

Case No. 116 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 23rd of December 1863.

Umrit Lall Bajpye, *Appellant,*

versus

Sheeb Pershad Bajpye, *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

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Baboo Mutty Lall Mookerjee for Respondent.

Where a Judge (in reversal of an order of the Lower Court) admitted the claim of a person representing himself to be the purchaser of a decree from the decree-holder, to execute the decree.—HELD that the Judge had no jurisdiction under Section 11 Act XXIII of 1861, as the the applicant was not a party to the suit in which the decree was given, nor (as the Lower Court had ruled) the representative of such party.

Bayley, J.—IN this case a party, representing himself to be the purchaser of a decree from a decree-holder, applied to the Principal Sudder Ameen to execute the decree. The Principal Sudder Ameen held that the alleged purchase was collusive and refused the application. The applicant appealed to the Judge, who held that the alleged purchase was not collusive and admitted the claim.

The opposite party now appeal here, urging, *First*, that the Judge had no jurisdiction, as the appeal could only be made under Section 11 Act XXIII of 1861 between the parties to the suit in which the decree was given, whereas the applicant was not the party, and the Principal Sudder Ameen had ruled that he was not the representative of that party. We consider this objection valid under the law cited, and being a plea of jurisdiction we take it up at this stage and admit it.

Secondly, that the decree had been satisfied by adjustment under Section 209. The record shows that this was so, although the Judge has not noticed it. It is true that the alleged purchase was of previous date to that adjustment, but the alleged purchase not having been proved or admitted by the Principal Sudder Ameen, and no appeal lying from his decision, there was in fact no prior purchase nor admitted decree-holder.

We decree the appeal and reverse the order of the Judge.

The 21st July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Procedure — Suits instituted before Act VIII of 1859—Section 387—Ex parte decree—Re-hearing.

Case No. 95 of 1864.

Miscellaneous Appeal from an order passed by the Officiating Judge of Behar, dated the 3rd of December 1863.

Musst. Russoolun and others, *Appellants,*

versus

Musst. Fuzeelut-oon-nissa, *Respondent.*

Mr. E. E. Twidale and *Baboo Kally Kishen Sein* for Appellants.

Mr. C. Gregory for Respondent.

A defendant in a suit instituted before the passing of Act VIII of 1859 is entitled, under Section 387, to any advantage of right which he might have possessed under the old procedure; but this does not bar him from availing himsef of any advantages which he may obtain from the new procedure—e. g., a re-hearing, under Section 119, in the case of an *ex-parte* decree.

Jackson, J.—IT appears from the statements of the Vakeel of the opposite party in this suit, that the plaintiff obtained an *ex-parte* decree against the defendant in his absence in the Court of the Principal Sudder Ameen; that when plaintiff attempted to execute this decree the defendant appeared before the Principal Sudder Ameen, and prayed to be heard on the point that no notice of the institution of the suit had been served upon him; that the Principal Sudder Ameen refused to entertain his request because the suit was instituted under the old procedure; and that the Judge on appeal confirmed the Principal Sudder Ameen's decision on the ground that he could not listen to such an objection as that the defendant had not heard of the suit for more than three years after the decree was passed.

It is now on special appeal contended that the Judge was wrong in law as well as the Principal Sudder Ameen; that the defendant was entitled to the benefit of the new procedure under Act VIII of 1859, as that Act was passed before the *ex-parte* decree was given; and that the delay in calling on the Court to re-hear the case was no sufficient ground for rejecting the application.

We think that both Courts have erroneously applied the law. The defendant was clearly entitled to a re-hearing on the ground that no notice was served upon him under Sec. 119 Act VIII of 1859. A defendant in a suit instituted before the passing of Act VIII of 1859 is entitled under Section 387, to any advantage of *right* which he might have possessed under the old procedure; but this does not debar him from availing himself of any advantages which he may *obtain from the new procedure.* Here an *ex-parte* decree having been passed, the defendant could apply for a rehearing under Section 119 of that procedure.

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Again. he is allowed to avail himself of this Section at any time after the passing of the decree until within 30 days after process of execution has been served upon him. If, then, the plaintiff delayed three years to execute his decree, the defendant was at liberty even at that late period to ask for a re-hearing, and the Judge should not have shut him out of Court solely on account of his delay.

The Judge's order is reversed, and the case remanded to him with directions that he will direct the Principal Sudder Ameen as above upon the law, and order him to make the usual enquiries under Section 119 as to whether the defendant is entitled to a re-hearing of his case or not.

The 25th July 1864.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Interest—Decree of Privy Council.

Case No. 140 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 20th of February 1864.

Joykissen Bose, *Appellant,*

versus

Dr. A. Wise, *Respondent.*

Mr. A. F. Lingham and *Baboo Chunder Madhub Ghose* for Appellant.

Mr. R. T. Allan for Respondent.

Where a decree of the Privy Council does not give interest, the Court executing such decree has no power to allow interest.

Jackson, J.—THIS is an appeal from an order of the Judge in execution of a decree of the Privy Council awarding costs. The Judge has directed that the decree shall be executed with interest.

It is said that the Privy Council remanded the case for further enquiry, and that the final decision went against the party in whose favor the Privy Council had awarded costs, and that consequently that party is no longer entitled to the costs. On this point we agree with the Judge that the order of the Privy Council is not affected by the subsequent orders on remand.

It is then said that the Judge should not have given interest upon the costs. It appears that the decree of the Privy Council did not give interest. Looking to the precedents on this point, we think the Judge should not have allowed interest;—Sevestre's Select Reports, vol. 3, p. 345, 14th April 1853; and Morley's Digest, p. 102, new series, vol. 1, Edition 1852.

We therefore reverse the Judge's decision and direct that the decree for costs shall be executed without interest.

Each party will pay his own costs of this appeal.

The 27th July 1864.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Section 119 Act VIII of 1859—Ex-parte decree—Appeal.

Case No. 117 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 5th of December 1863.

Sreedhur Churn Nundee, *Appellant,*

versus

Juggobundoo Paul and others, *Respondents.*

Baboo Mohesh Chunder Bose for Appellant.

No one for Respondents.

A special, and not a regular, appeal will lie from an order rejecting a respondent's application for the re-trial of an appeal heard in his absence.

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Jackson, J.—The special appellant was respondent in an appeal before the Judge, but failed to attend at the hearing of the appeal, when the decision of the first Court was reversed in his absence. He then petitioned for a retrial of the appeal, on the ground that he had not wilfully failed to attend. The Judge made enquiries into the circumstances on which the respondent attempted to excuse his non-attendance, but discrediting the allegations, he rejected the claim for a new trial.

The respondent below appeals to this Court from the order of rejection; and a preliminary objection is taken that no such appeal can be preferred. It is said that, under Section 37 Act XXIII of 1861, an Appellate Court has all the powers of a Court of original jurisdiction; that the Lower Court accordingly made enquiries into the causes shown by the respondent for non-attendance at the hearing of the appeal under Section 119 Act VIII of 1859; and that under the same Section an appeal is allowed from an order rejecting the application for the rehearing of the appeal.

We observe that the Section in question allows of an appeal from an order rejecting an application only "*in appealable cases.*" It therefore cannot refer to appellants and respondents, because no further appeal *on the facts* lies from a decision passed in an appeal. A special appeal will lie from the order of a Judge rejecting a respondent's application for the re-trial of an appeal heard in his absence on the ground that that order is contrary to law; but no appeal *on the facts* will lie. A special appeal lies in such a case, as it lies from all other decisions of an Appellate Court.

The only ground taken in this appeal is that the appeal was in respondent's absence heard *ex-parte*. It does not appear that the Judge did not enquire into the facts of the case, or examine the evidence. He recorded his opinion on the evidence, and gave his reasons for coming to a different conclusion from that which had been arrived at by the Lower Court. He did not hear the respondent or his vakeel orally, because they did not attend. But he was bound under the circumstances to decide the case without hearing them after full consideration of all the evidence on the record.

There is no ground for interference. This appeal is dismissed.

The 28th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Section 206 Act VIII of 1859—Adjustment — Appeal — Order of Small Cause Court in execution.

Case No. 167 of 1864.

Miscellaneous Appeal from an order passed by the Officiating Judge of Bhaugulpore, dated the 7th January 1864, affirming an order passed by the Principal Sudder Ameen of that District, dated the 8th December 1863.

Motee Lall, *Appellant,*

versus

Ram Doss, *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

Moulvie Murhummut Hossein for Respondent.

According to Section 206 Act VIII of 1859, no adjustments made out of Court are admissible by the Court in execution.

No appeal lies to the High Court from the order of a Small Cause Court in execution.

Jackson, J.—In execution of decree, the Judge of the Small Cause Court of Patna is stated to have admitted, in satisfaction of three decrees, a receipt supported by evidence shewing that the amount due on those decrees had been paid to the decree-holder out of Court.

The ground taken on appeal is that Section 206 Act VIII of 1859 is imperative in directing that no such adjustments shall be admitted by a Court in execution.

The law is correctly laid down by the appellant; but as no appeal lies to this Court from the order of the Small Cause Court Judge in execution, we cannot interfere. But if it did, we should not be inclined to interfere under any general power where, as here, the Judge appears on good grounds to have satisfied himself that the money was really paid.

Appeal dismissed with costs.

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The 28th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Section 257 Act VIII of 1859—Appeal—Reversal of Sale.

Case No. 183 of 1864.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 16th February 1864.

Rajnarain Koer, *Appellant,*

versus

Inder Chunder Baboo and others, *Respondents.*

Mr. R. T. Allan and *Baboo Banee Madhub Banerjee* for Appellant.

Baboos Dwarkanath Mitter and *Mohesh Chunder Chowdhry* for Respondents.

Under Section 257 Act VIII of 1859, no appeal lies from the order of a Lower Appellate Court affirming the order of the Lower Court rejecting a petition for the reversal of a sale in execution on the ground of irregularity.

Bayley, J.—THIS is an appeal from the order of the Judge affirming the order of the Principal Sudder Ameen rejecting a petition for the reversal of a sale in execution on the ground of irregularity.

Under Section 257 Act VIII of 1859, there is no appeal to this Court. Dismissed with costs.

The 28th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Remand (by Lower Appellate Court).

Case No. 144 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 23rd December 1863.

Radhabullub Surma and others, *Appellants,*

versus

Anundmoyee Debea and others, *Respondents.*

Baboos Onookool Chunder Mookerjee and *Hem Chunder Banerjee* for Appellants.

Baboo Romanath Bose for Respondents.

There is no appeal from the order of a Lower Appellate Court remanding a case a second time on the ground that the former order of remand had not been carried out.

A Lower Appellate Court, in remanding a case a second time, ought not to confine itself to a vague general remark that its previous order has not been carried into effect, but should also state what the main requirements of such order were and how the Lower Court's decision shows that they have not been carried out.

Bayley, J.—IN this case the order which has been appealed against is one by the Judge, simply to the effect that, as the Principal Sudder Ameen has not carried out his (the Judge's) former order of the 28th February 1863, the Principal Sudder Ameen is now desired to do so.

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From that *former* order of remand, the present appellant made no appeal. He now appeals against the *present* order, and urges that the Principal Sudder Ameen has, in fact, carried out the Judge's previous order of the 28th February 1863; and for the purpose of showing this, the pleader wishes to plead generally upon the merits of that *previous* order.

This is, to our view, a means merely of re-opening an appeal, now, in a case where, if the petitioner wished to appeal, he should have done so when the previous order referred to was passed, which he did not do.

Moreover, an order of this nature by the Judge cannot be said to be complete till the Principal Sudder Ameen, after the receipt of it, shall have recorded some further decision in obedience to it. The present appeal therefore is in this view also premature and inadmissible.

At the same time we may remark that, when a superior Court gives a direction like this now before us, it should not confine itself to a vague general remark that its previous order has not been carried into effect, but should likewise state what the main requirements of such order were, and how the Principal Sudder Ameen's decision may show that they have not been carried out.

Although, then, there is no right of appeal in this case, and the appeal is consequently dismissed with costs, still we think it proper that a copy of these remarks should be forwarded to the Judge for his information and guidance.

The 28th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Time for Appealing—Holidays.

Case No. 147 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Dinagepore, dated the 19th December 1863.

Mosuruf Ali Chowdhry, *Appellant,*

versus

Janokenath Adhicaree, *Respondent.*

Baboos Debendernarain Bose and *Kally Kisher Sein* for Appellant.

No one for Respondent.

An appellant, whose time for appealing expires during holidays, may put in his appeal on the first day the Court opens after the holidays.

Jackson, J.—This is an appeal from the decision of the Judge of Dinagepore refusing to admit an appeal preferred by the appellant on the 21st November on the ground that it was after time, as it should have been presented on the 17th November, the day on which the Courts reopened after the Dusserah vacation. It is said that, although it may be that the Court did partially re-open on the 17th November, it was generally known in the district that the holidays had been extended by this Court to and inclusive of the 20th November, and it is shewn that intimation had been sent to the Zillah Courts that, where the state of business permitted of the indulgence, the holidays might be extended to the 21st

There is no doubt that the appellant is correct in these facts. The appellant may have been misled by the order he alludes to, and the Judge should, we think, have taken his statements into consideration and admitted the appeal, even though it was not filed at the exact time at which it might have been put in.

It may be a question, however, whether the appellant was not legally entitled to put in his appeal on the 21st, as the holidays did to some extent continue until the 20th. We think that, as the rule is that an appellant,

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whose time for appealing expires during holidays, shall put in his appeal on the first day the Court opens after the holidays; and as the holidays were even partially extended by order of this Court to the 20th November, the appellant was in time when he presented his appeal on the 21st, the first day after the 20th on which the Court opened.

We reverse the Judge's decision and admit the appeal, which we remand to the Judge for trial.

The 29th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Certificate under Act XXVII of 1860.

Case No. 221 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 6th February 1864.

Abdool Ali, *Appellant,*

versus

Abidunnissa Khatoon, *Respondent.*

Mr. W. A. Montriou and *Baboo Sreenath Banerjee* for Appellant.

Messrs. R. V. Doyne and *G. C. Paul* for Respondent.

As a general rule, the heir to a deceased is the person who should have a certificate to collect the debts and manage the estate of the deceased under Act XXVII of 1860. If he, as heir, is entitled to the whole surplus of the estate, the fact of his having been in a hostile or friendly position as regards the deceased will not be material. Where there are several heirs and no disputes among them, he who is entitled to the largest share may, in the absence of other disqualifying circumstances, and in the discretion of the Court, be entrusted with the duty.

Jackson, J.—This is an appeal from the order of the Judge giving a certificate under Act XXVII of 1860 to the estate of the daughter of Wahid Ali to deceased's mother Abidunnissa in preference to the deceased's grandfather Abdool Ali. The Judge has preferred the former, because he considers that she is the most fit person to hold the certificate, and has rejected the claim of Abdool Ali, because it was "on record that he had disinherited his son Wahid Ali, and was therefore not a proper person to be entrusted with the management of the affairs of the deceased," and also because "his only object in making the application was to establish his right to succeed to a share of the property left by the deceased."

Mr. Montriou for Abdool Ali has urged, *first*, that he as the grandfather is entitled to the largest share of the estate of the deceased, and has therefore a right to the certificate; that this view of the law was adopted by the High Court in a similar case, page 301, for the reports (Hay and Co.'s) for 1863; *secondly*, that Abdool Ali did not disinherit Wahid Ali, and that under Mahomedan Law he could not disinherit him; that the first ground given by the Judge for refusing him the certificate would therefore not stand good; and, *lastly*, that the second ground given was not sufficient, as Abdool Ali was not wrong in attempting to establish his title to any property to which he considered himself entitled.

Mr. Doyne for respondent Abidunnissa stated that the Judge was thoroughly aware of the state of the family of which the appellant and respondent were members; that

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long disputes and litigation had taken place in that family between Abdool Ali on the one hand, and Wahid Ali on the other; that it was on consideration of all the facts connected with these disputes that the Judge had considered that Abdool Ali was not a proper person to be entrusted with a certificate to the estate of Wahid Ali's daughter.

We think that as a general rule the heir to the deceased is the person who should have a certificate to collect the debts and manage the estate of the deceased under Act XXVII of 1860. If he, as heir, is entitled to the whole surplus of the estate, the fact of his having been in a hostile or friendly position as regards the deceased will not be material. The sole heir will be the best person to take care of his own interests. It is a different thing where there are, as in this case, heirs who are contending with each other, and who have been long engaged in litigation. Where there are no such disputes, the heir who is entitled to the largest share, might perhaps in the absence of other disqualifying circumstances be the person entitled to a certificate. But he is not entitled to it as of right under all circumstances in preference to any other heir. The Court has by the law a discretion as to whom it shall entrust with this important duty out of the several heirs who have a right to it. The Court might then have granted the certificate in this case to either Abdool Ali, the grandfather, or to Abidunnissa, the mother. It preferred the latter; and we think after hearing all the circumstances of the family litigation as disclosed in the records of it, and referring to the decisions passed in that litigation, that the Lower Court has in this matter exercised a sound discretion. The fact that Abdool Ali is himself a very large, and indeed the principal, debtor to the estate, is a further matter disqualifying him from holding the appointment to recover the debts of the estate. When to this is added the fact that he has been proved to have attempted by fraud and perjury to dispossess Wahid Ali of his whole estate, it would have been, we think, most unsatisfactory to have given Abdool Ali the certificate.

With this view we dismiss this appeal with costs, and confirm the order passed by the Judge of Dacca.

The 29th July 1864.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Section 217 Act VIII of 1859—Execution—Sale—Security.

Case No. 213 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 2nd April 1864

Gureeb Hossein Chowdhry, *Appellant,*

versus

Mr. J. P. Wise, *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* for Respondent.

A judgment-creditor is entitled to take out execution without giving security, and the judgment-debtor cannot stay a sale without giving security.

Bayley, J.—This is an appeal from an order of the Judge calling upon the judgment-debtor to give security before an order to stay a sale in execution of a decree of this Court which was the subject of an appeal to Her Majesty's Privy Council should be issued; and in support of the appeal, it is urged that, as the decree of this Court may be reversed, it was for the Lower Court to call upon the decree-holder, not the judgment-debtor, to give security.

The decree of this and of every Court must legally be presumed to be correct, till ruled by a superior Court not to be so. It follows that the judgment-creditor is entitled to take out execution without security, and that the judgment-debtor cannot stay a sale without giving security.

The order of the Court below is, therefore, quite correct, and we reject the appeal with costs.

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CRIMINAL RULINGS.

The 11th January 1864.

Present:

The Hon'ble G. Loch and C. Steer,

Judges.

Death—Pregnancy.

Criminal Referred Jurisdiction.

Queen *versus* Mussamut Ghurbhurnee.

Where a prisoner was pregnant, the sentence of death passed upon her was ordered not to be carried out until after her delivery.

THE Court, having perused the record of the trial, confirm the sentence of death passed upon the prisoner by the Sessions Judge. As the Sessions Judge states that the prisoner is pregnant, this sentence will not be carried out till such time after her delivery, as is usual in such cases.

The 11th January 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Witness (Examination of).

Criminal Appellate Jurrisdiction.

Queen *versus* Sheik Kyamut.

In every Sessions trial, no matter how often the case has been before the Court, the witnesses must be examined *de novo* in the same manner as if the case were entirely new, and the witnesses had not been examined before.

To read to a witness his deposition on a former trial is not an examination of the witness in the presence of the accused.

THIS prisoner was brought to trial with another by name Genda, when the case of the latter was remanded to the Zillah Court for further investigation. Genda had been tried and convicted; and when this Court had the case before it for confirmation of sentence, it was found that the investigation was not complete, and that it was necessary that further evidence should be obtained. Kyamut, though accused of the same crime as Genda, had not then been committed, but this commitment was made before the order of this Court, in respect of the other accused Genda, reached the Sessions Judge.

In the trial of Kyamut, the Sessions Judge, instead of recording the evidence of the witness in presence of the accused, had the recorded testimony taken in Genda's case read over to them; they were asked if they gave it, whether it was correct, and whether the prisoner was that Kyamut referred to by them.

This is not the mode in which, under the Code of Criminal Procedure, a trial ought to be conducted. Every trial requires to be held in the presence of the accused before whom the complainant and every witness is to be examined. To read the deposition of a witness on some former trial to the witness is not an examination of the witness in presence of the accused as to his knowledge of the facts which form the subject matter of the accusation; and a trial where evidence is thus taken is not a legal trial as ruled by this Court in another case. In every Sessions trial, no matter how often the case has been before the Court, the witnesses must be examined *de novo* in the same manner as if the case were entirely new and the witnesses had not been examined before.

We quash the trial of the prisoner, and direct that he be re-tried in the mode indicated above.

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The 27th January 1864.

Present:

The Hon'ble G. Loch and C. Steer,

Judges.

Murder—Intention.

Criminal Referred Jurisdiction.

Queen *versus* Shobha Sheikh Gorman.

Where the intention of causing death was not sufficiently established, a sentence of death was commuted to transportation for life.

In this case we think that the prisoner has been rightly convicted of murder, but we do not think it a case in which the extreme penalty of the law should be carried out; for, looking at the weapon made use of, and the evidence given by the witnesses, it appears to the Court that the intention of causing death has not been sufficiently made out. We therefore sentence the prisoner to transportation for life.

The 30th January 1864.

Present:

The Hon'ble G. Loch and L. S. Jackson,

Judges.

Land Disputes—Sundays.

Criminal Referred Jurisdiction.

Grijamonee *versus* Ishur Chunder.

In a case of disputed possession of land, the Magistrate should record the proceedings required by Section 318 Code of Criminal Procedure, and look to possession, not to right, *i. e.* maintaining in possession the party in possession and forbidding disturbance of possession.

Magistrates should not take up judicial work on Sundays.

Loch, J.—A DISPUTE likely to cause a disturbance of the peace regarding the possession of a Talook Brojobullubpore, arose between Grijamonee on the one side, and Ishur Chunder on the other. The Magistrate found it necessary to bind over both parties to keep the peace; and, on the 30th August 1863, gave possession of the property to Ishur Chunder.

In his proceeding the Magistrate says:—"To obviate this (disturbance), I have seen all three parties together. An arrangement cannot be come to. The Judge of Moorshedabad has issued an injunction to Ishur Chunder to administer to the estate. I therefore order possession to be given to Ishur, who was managing the whole estate for both Grijamonee and Prosonomoee, till the latter died."

In her first petition to the Magistrate, Grijamonee charges Ishur Chunder, a discharged manager, with collecting men to disturb the peace. It appears, however, that Ishur Chunder claims to administer to the estate of Prosonomoee, the late proprietor of a 10 annas share in this property, Grijamonee having a 6 annas share. Ishur Chunder obtained a certificate under Act XXVII of 1860 from the Judge of Moorshedabad; and under the authority of that certificate, proceeded to make collections, and hence, apparently, this dispute arose

The objections to the decision embodied in the petition to the Sessions Judge, dated 3rd September 1863, are, *1st*, that the Magistrate drew up no proceeding as required by Section 318 of the Code of Criminal Procedure; *2nd*, that the case was decided on a Sunday; and *3rd*, that the Magistrate has given Ishur Chunder possession of the whole property, whereas he admits the right of Grijamonee to a 6 annas share.

The Sessions Judge forwarded the proceedings to this Court, with his letter of 17th December last, and requests the Court to reverse the proceedings of the Magistrate, as he considers the 1st and 3rd objections, taken by the appellant, valid; and on the 2nd, he says that, though he may not be illegal to decide a case on a Sunday, it should be prohibited.

On the 1st and 3rd grounds, the order of the Magistrate must, I think, be reverses. If the Magistrate found it necessary to pass an order for possession, he should have proceeded strictly in conformity with the law Section 318 of the Criminal Procedure Code, which he certainly has not done. Further, in giving possession of the whole property to Ishur Chunder, he has acted in oposition to the principle laid down in the above Section, which requires a Magistrate to look to possession, and not to right. Grijamonee appears to have been in possession of her share of the property. Ishur Chunder claims under a certificate from the Judge of Moorshedabad. At the most, he can only step into the shoes of Prosonomoee, whom he represent. He cannot interfere with Grijamonee.

On the second point, though it does not appear that appellants have suffered injury from having their case tried on a Sunday, yet, I think, the Magistrate should be prohibited from taking up judicial work on that day. As a Police Officer, the Magistrate is frequently obliged to pass orders on

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Sundays, and no objection can be taken to his proceedings. Parties charged with heinous offences may be brought in, and their immediate examination may be necessary for the ends of justice, and it is therefore obvious that all work on a Sunday cannot be prohibited. But, as a rule, the Magistrate should not sit as a Judicial Officer, and dispose of cases in the ordinary course of business on a Sunday, because, to put it upon no higher ground, Sunday is a recognized holiday throughout the country; and on that day judicial business is suspended in all the Courts, and parties might be put to great inconvenience if their cases were liable to be called up for hearing on that day at the caprice of a Magistrate, and much injustice might be done. It is a day on which there are no recognized Office hours, and were a Magistrate to make a summons returnable on a Sunday, and to dismiss the case for default, if the complainant were not present, it would, I think, be a sufficient ground for reversing such order that it was passed on a Sunday.

Jackson, J.—I concur in reversing the Magistrate's order, on the ground that it proceeds wholly upon an illegal ground, namely, that Ishur Chunder has received a certificate entitling him to administer to the estate, (and is, therefore, entitled to possession), and not upon a finding after proper enquiry that one party or the other is actually in possession.

And it is manifest that this order must have been passed with very little consideration.

The possession of Ishur Chunder, as manager for the two ladies, was the possession of the ladies themselves, and could form no reason whatever for retaining him in possession, as against one of them on the demise of the other, to whose estate he may have been declared entitled to administer.

The order is also quite irregular in point of form, both as to the preliminary proceedings, and in the shape of the order itself.

The proceedings required by Section 318 of the Act ought certainly to have been recorded, and the parties ought to have had notice that the Magistrate would proceed to hear and determine the case on a particular day.

To take up the case and pass final orders on a Sunday, without notice to the parties, was certainly improper; for although necessity may compel a Magistrate to pass orders on that day, and they will not be null and void by reason of being passed on a Sunday, yet the day is a *dies non*, upon which the Courts are not attended, and on which no man, without express notice, could suppose that his case was likely to be taken up.

And the order goes beyond the terms of the law, which authorizes the Magistrate only to declare the party whom he may decide to be in possession entitled to retain possession, and forbidding disturbance of possession.

The Magistrate in this case has ordered the Police *to give possession.*

I also observe certain proceedings of the Magistrate, in taking bonds, to keep the peace, which are not in conformity with Section 282 of the Code of Criminal Procedure.

And I must also record my disapprobation of the tone of the Magistrate's letter in which he refuses to explain his conduct in deciding this case upon a Sunday.

The Judge having intimated his opinion that such a course was irregular, and it being certainly unusual, it was the Magistrate's duty to submit an explanation of the reasons which induced him to adopt that course, and not to fence with his superior in the manner exemplified in his letter.

The 30th January 1864.

Present:

The Hon'ble G. Loch, F. B. Kemp, and L. S. Jackson, *Judges.*

Jurisdiction—False Evidence.

Criminal Appellate Jurisdiction.

Queen *versus* Bhohisan Mahatoon.

Committed by the Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of giving false evidence.

A Sessions Judge is competent, under Section 435 Code of Criminal Procedure, to order the committal of a person accused of giving false evidence after the discharge of such person by the Magistrate, Section 359 notwithstanding (*Kemp, J. dissenting*).

Kemp, J.—THIS case has been tried with the assistance of a Jury.

It is contended that the Judge, in directing the Magistrate to commit the prisoner to take his trial upon a charge of giving false evidence, has exceeded his jurisdiction. It appears that one Imrit Lall was charged by his employer with embezzlement. The appellant in this trial gave evidence in that case, and Imrit Lall was committed, and

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tried, and convicted by the Sessions Judge. The present appellant was not examined before the Sessions Judge on the trial of Imrit Lall, and therefore the offence of giving false evidence, if such offence has really been committed, was not committed before the Sessions Judge (*See* Section 172 of the Code of Criminal Procedure). The Sessions Judge, on perusal of a proceeding of the Deputy Magistrate, appears to have arrived at an opinion that the appellant had given false evidence in the Magistrate's Court, and he directed the Magistrate to investigate, and, if necessary, to commit.

The Magistrate acquitted the prisoner. The Judge, on *the appeal of the employer of Imrit Lall*, directed the committal of the prisoner, and over-ruled his plea of want of jurisdiction, quoting Section 435 of the Code of Criminal Procedure. I am of opinion that, under the provisions of Section 359 of the Code of Criminal Procedure, the Judge was not competent to direct the Magistrate to investigate and commit for trial, as the prisoner did not give evidence before the Sessions Judge, and his case therefore does not fall within the purview of Section 172, and it is only in such cases that the Sessions Judge could take cognizance of the offence in the absence of a charge preferred by the Magistrate or other Officer specially empowered, under the Procedure Act, to make commitments to the Sessions Court (*See* Section 359).

I would quash the trial and conviction as illegal, and direct the immediate release of the prisoner.

The papers must go before another Judge.

Loch, J.—The appellant has been convicted of perjury. In a charge of embezzlement brought by his master against one Imrit Lall, the petitioner gave evidence before the Deputy Magistrate. The charge against Imrit Lall was proved, and he was committed for trial, and convicted by the Sessions Judge. The petitioner did not give evidence at the trial, but the Sessions Judge, on perusal of his evidence before the Deputy Magistrate, considering that perjury had been committed, directed the Magistrate to investigate the case with a view to committal. The Magistrate considered the charge not proven, and acquitted the prisoner; and the Sessions Judge then ordered his committal to the Sessions under the provisions of Section 435 of the Code of Criminal Procedure. By Section 359 of the Code of Criminal Procedure, a Court of Sessions can, as a Court of original Criminal jurisdiction, take cognizance only of cases referred to in Section 172; but under the provisions of Section 171, a Court of Sessions, when of opinion that there is sufficient ground for investigating any charge mentioned in the three preceding Sections, may send the case for investigation to any Magistrate having power to try, or commit for trial, the accused person for the offence committed, and the Magistrate shall thereupon proceed according to law. Now, among the offences enumerated in Section 169 of the Code of Criminal Procedure, is perjury or giving false evidence under Section 193 of the Penal Code; and as this offence can only be tried by the Sessions Judge, he was competent, under the provisions of Section 435 of the Code of Criminal Procedure, to order the committal of an accused person discharged by the Magistrate.

It appears also that the employer of Imrit Lall is engaged in carrying on this prosecution. This he could not do under Section 169 without permission; but the Sessions Judge's order, directing the investigation, may, I think, be considered tantamount to a permission to prosecute even if no permission were given to him direct. I do not think therefore that the Sessions Judge has acted without jurisdiction in this case, and consequently the conviction of the Jury must stand.

Jackson, J.—I concur with Mr. Justice Loch. Section 169 of the Code of Criminal Procedure provides that certain offences shall not be enquired into without the sanction of the Court in or against which the offence was committed, *or of some other Court to which such Court is subordinate.*

The Sessions Court was a Court to which the Magistrate was subordinate, and the Sessions Court sanctioned the prosecution. The charge could therefore be entertained. But the Magistrate having discharged the accused person, the Sessions Judge could, and did, direct the Magistrate to commit under Section 435. His power under that Section is quite clear. Mr. Justice Kemp refers to Section 359 of the Procedure Code. That Section, it seems to me, only forbids a Sessions Court from taking cognizance of offences, except on a charge preferred by a Magistrate. But, then, the Sessions Court could, as we have seen, direct commitment, which is directing a charge to be preferred by a Magistrate; and on the charge so preferred, the Court of Sessions could proceed to trial.

I think the conviction was right.

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The 1st February 1864.

Present:

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Land disputes—Personal property (Restoration of).

Criminal Referred Jurisdiction.

Ramjeebun Doobey *versus* Luchmonee Dabea.

Reference under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Rungpore.

A Magistrate has no authority to restore to possession a person who has been illegally dispossessed. He must declare the party in actual possession entitled to retain possession until ousted by due course of law, and forbid all disturbance of such possession in the meantime.

If personal property of which a person has been unlawfully deprived come into the hands of a Magistrate, he may direct its restoration to the owner; otherwise the owner must sue for its value in the Civil Court.

Loch, J.—THIS is not a case that comes under the purview of Section 405 of the Penal Code, nor was it one in which the Deputy Magistrate should have interfered except to preserve the peace. Both parties claim the property as heirs of the deceased Ram Jeebun Doobey; and if the defendant have ousted the complainant and taken possession, her remedy to recover possession is in the Civil Court under the provisions of Section 15 Act XIV of 1859. As Act IV of 1840 is no longer in force, the Magistrate has no authority to restore a person to possession. All that he can do in disputes likely to lead to a breach of the peace is to follow the course prescribed by Chapter XXII Section 318 of the Code of Criminal Procedure, and, after enquiry, declare the party whom he finds in actual possession entitled to retain possession until ousted by due course of law, and forbid all disturbance of such possession in the meantime. With regard to personal property, of which a complainant has been forcibly or illegally deprived, we think a Magistrate might order its restoration to its owner if it come into his hands, but otherwise the complainant must seek to recover it in its value through the Civil Court.

The 2nd February 1864.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Charge (of Judge)—Offence by public servant (Section 217, Penal Code).

Criminal Appellate Jurisdiction.

Queen *versus* Abdool Juleel.

Tried by Mr. E. F. Lautour, Sessions Judge of Patna, on a charge of taking gift in order to screen an offender from legal punishment.

A Judge may give the Jury his opinion of the guilt or innocence of the prisoner if he shows them clearly that the decision rests with them.

It is only necessary for a conviction under Section 217 of the Penal Code, to show that the prisoner knew that the person he released was in danger of punishment, and that the prisoner released such person with the intention of saving him.

THE prisoner, having been convicted by a Jury, can appeal only on points of law. His pleader, Mr. C. Gregory, urges that the Judge's direction to the Jury is irregular, inasmuch as it intimates broadly the Judge's opinion of the prisoner's guilt, whereas, according to Mr. Gregory's contention, the Judge could lawfully do no more than recapitulate the evidence on both sides, and say whether he thought the witnesses trustworthy.

If he could do this, and if it be admitted there was evidence to go to the Jury, it is clear that he could in that way virtually say whether he thought the prisoner guilty or innocent.

In fact, however, the Code of Criminal Procedure does not prohibit the Judge from giving the Jury his opinion, provided he shews them, as the Judge did in this case, that the decision rested with them, and that they could decide as they thought proper.

Nor does it appear to me objectionable that the Judge should assist the Jury with his opinion. In the matter of sifting evidence and of weighing probabilities, he has probably had more experience than they, and I see no reason why they should not have the benefit of that experience.

In the case before me, I do not consider the Judge's view was expressed more strongly than the evidence warranted, if I may judge by his notes, as the original record is not here.

And, in fact, it is clear that the Jury were not carried away by the Judge's opinion,

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as he strongly stated his opinion that the prisoner might be convicted on three counts, whereas they have convicted him on one only.

Mr. Gregory next urged that, before a public servant could be convicted under Section 217 of the Indian Penal Code, of knowingly contravening Section 160 of the Code of Criminal Procedure, it must be shown that he knew the person released to have committed some offence, so that, unless released, he would certainly be punished.

I think all that is necessary to show is that the person in custody, and afterwards irregularly released by the prisoner, was in danger of being subjected to legal punishment, and that the prisoner released him with the intention of saving him.

The Jury seem to have thought it was so in the present case.

It does not appear to me that any error in law has been pointed out in the proceedings of the Court of Sessions, and I reject the appeal.

The 2nd February 1864.

Present:

The Hon'ble G. Loch, L. S. Jackson, and Shumboonath Pundit, *Judges.*

Judgment (Reasons for).

Criminal Appellate Jurisdiction.

Miscellaneous Case.

Queen *versus* Hurihur Churn Sing and another.

A Magistrate is not bound to give his opinion as to the character of the evidence in prolix detail; much less the Judge in confirming the sentence passed by the Magistrate.

Shumboonath Pundit, J.—THESE prisoners, having been convicted of riot, &c., and punished with six months' imprisonment by the Magistrate of Behar, appealed to the Sessions Judge, who upheld the sentence. Against this order the prisoners have appealed to this Court.

It is said that there was some dispute regarding water-course between the prisoners and others of the village of Bombai, and the two prisoners acquitted by the Magistrate and others of the adjoining village of Rampore, which dispute led to a riotous assembly with arms, and to a serious breach of peace with wounding. There is reason to suspect that perhaps the people of Rampore first had done some acts likely to injure standing crops in the village of Bombai, and that the people of the latter village afterwards caused waters of heaven preserved in a reservoir of the village Rampore to flow away to the injury of the crops in that village. While it is not clear whether the water from Bombai ever fell into the reservoir of Rampore, that the preservation of the water in the reservoir was at all opposed to the greater flow of the water from the water-course flowing from Bombai towards a third village touching some lands of Rampore, or that the cutting open of the reservoir of the latter village was anywise necessary to make the water of the water-course of Bombai flow more freely, it is proved that the people of this last village, before the commission of the crime for which the prisoners are punished, had actually a desire to draw water from their own village more freely than it was flowing before, that the people of Rampore had attempted to dam up the flowing down of the water from the water-course of Bombai, on which the people of this village cut open the reservoir of Rampore. It is also clear that, at this very time, the people of Rampore had themselves cut a small outlet from their reservoir, in order to drain away superfluous water from it. For want of explanations regarding the points noticed above as those which are not clear, between the two series of facts mentioned afterwards as established, as well as between these and the former explained points, complete connection and proper relationship cannot be ascertained, and so the facts of the history of the case are not satisfactorily intelligible to my mind.

This, however, is not a matter which can by itself afford this Court any ground of interference against findings of fact, though there might be some ground to suspect, if the Lower Courts understood the facts only to the extent that I have been able to gather and no more, that perhaps, on a thorough and clear understanding of all the facts connected with the case, the party of the prisoners possibly might not have been considered guilty to the extent they have been believed by the Lower Courts, or that the Rampore people might not have been considered so clearly entitled to be acquitted as they were held by the Magistrate. It is however, certain that both the Lower Courts have tried the case of the prisoners as a case of right or wrong conduct of the people of two villages having some quarrel between them entirely irrespective of any particular notice of the individual guilt of the two prisoners. Throughout the judgments of

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both the Courts, there is no allusion to the statements of the witnesses who describe these prisoners as present or as passing orders, no allusion to the slight difference that there is in the different depositions of these witnesses upon these two points, and on allusion whatever to the defence of *alibi* set up by these two prisoners.

In a criminal case, it would not perhaps be sufficient to state that finding these prisoners guilty is of itself sufficient to show that the evidence to the contrary, in support of the innocence of the prisoners, must have been as a matter of course disbelieved before any opinion could be pronounced regarding their guilt; or in other words by the fact of believing the prisoners guilty, their defence has necessarily been disallowed. The ends of justice may require that the evidence for the prosecution should be weighed jointly with the evidence for the defence, and sentence to be pronounced after both sides have been looked into. It would not perhaps be considered as any great imposition or hardship if the Judges punishing a person should, if required to give their reasons for believing evidence against a prisoner, be also directed to give some for disbelieving the counter-evidence offered by the latter in support of his own innocence.

It is not at all necessary, in the present state of the case, to look beforehand to the probable conclusions to which the Courts below may arrive on this point. The defence of *alibi* was pleaded before the Magistrate, and no distinct notice was taken of it. The fact was complained to the Sessions Judge, and he too is silent upon this matter, and I think that the ends of justice require that the Magistrate should be asked to take the defence into his consideration, and to pass a new order in *favor* of the prisoners if this examination leads him to this conclusion; that, if he thinks proper to uphold his previous order against the prisioners, he should be asked to state briefly his reasons for disbelieving the defence; that in this case, after the Magistrate has disposed of the case, the Sessions Judge be asked to examine in the appeal of the prisoners formerly lodged before him, the evidence of the prisoners in support of their innocence, and to proceed as the Magistrate has been asked to do; and that the prisoners, immediately on a remand being ordered, be allowed to be released on bail until the final decision of the Sessions Judge, if there be any necessity or trying the former appeal to the Sessions udge. The Magistrate may, at the same time, be asked to state a little more fully the points regarding which I have said I am not quite certain. The case should go to a second Judge, and if my colleague agrees on the whole with my proposal, and be not prepared to go to the extent that I have proposed, or proposes some other course of proceeding, I would like to know his proposals that I may see whether I do not find reasonable grounds for being convinced of their propriety.

Loch, J.—A serious affray took place between the people of the villages of Bombai and Rampore, occasioned by the breaking down of a dam in Mouzah Rampore, which obstructed the flow of the water from the lands from the Mouzah Bombai.

The Joint Magistrate considered that the people of Bombai were the aggressors, they having without justification broken down the dam of Rampore; and therefore releasing the people of the latter village, he sentenced those of the former village, against whom he considered the charge to be proved, to six months' imprisonment, and this sentence was confirmed on appeal by the Sessions Judge.

The prisoners have come up in appeal to this Court, on the ground that the Sessions Judge has failed to give any opinion upon the evidence for the defence,—nor has he passed any opinion on the principal question which was before him, *viz.* the part which the prisoners individually took in the affray. The pleader states that it is admitted that there was an affray, but the Sessions Judge only determined which party was justified in that affray, and he held the Bombai people to be in the wrong, because they cut the dam which the Rampore people had erected to retain the water in their own fields. That however was a question of a subsidiary character important only for the determination of the relative guilt of the inhabitants of the two villages; but the primary question for him to determine was whether the prisoners were actual parties to the affray, and what part they took in it. That question has not been enquired into, nor has the Judge expressed any opinion as to the evidence adduced by the prisoners to prove an *alibi*.

It is admitted that there is evidence on the record to prove the charge against the prisoners, and the Joint Magistrate's proceeding, which enters at length into the cause of the affray, ends with these words:—"I am clearly of opinion that they (the Bombai "people) were the aggressing party, and " their offence is aggravated by the nature

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"of the weapons they chose to arm "themselves with," and then he finds the charge proven against the prisoners. The Sessions Judge also enters at length into the cause of the dispute, and agrees with the Magistrate as to the misconduct of the Bombai people, and finishes by saying, "I see no reason to question the Joint Ma-"gistrate's view of the evidence before him, "nor the sentence he has passed, and reject the appeal." Both these authorities might, no doubt, have given their opinion as to the character of the evidence in greater detail, but it cannot be said, because that detail is wanting, that neither the Magistrate nor Sessions Judge has considered the evidence adduced by both parties. It is quite unnecessary for an Appellate Court confirming the decision of a Lower Court to enter into prolix detail if it be satisfied by a perusal of the record that the proceedings below and the conviction are correct. I cannot perceive that such omission can form any legitimate ground of special appeal. I would reject the appeal.

Jackson, J.—I concur with Mr. Justice Loch in refusing to disturb the orders of the Lower Appellate Court, which, it seems to me, cannot be touched in this instance.

This was a case in which certain persons were convicted before a Magistrate having jurisdiction of an offence under the Penal Code, and afterwards appealed to the Court of Sessions, which confirmed the sentence.

Section 428 of the Criminal Procedure Code provides that the orders of an Appellate Court passed in appeal shall be final, except as provided in Section 405 of the same Act. That Section enables this Court to call for the records of any case tried by any Court of Session for certain purposes, and declares that, if the Court be of opinion that the sentence or order is contrary to law, it shall reverse the same, &c.

And Section 439 provides that no trial in any Criminal Court shall be set aside, and no judgment passed by any Criminal Court shall be reversed, either on appeal or otherwise, for any irregularity, unless a failure of justice has been occasioned thereby.

The only matter complained of in this case is that, whereas the accused persons or some of them pleaded an *alibi*, the Magistrate and Sessions Judge have severally omitted to record their opinion on the evidence in support of that plea, although they have fully recorded their opinion respecting the evidence for the prosecution.

This objection, which the petitioner's pleader contends involves a defect of investigation so grave as to vitiate the whole proceedings, cannot, I think, be sustained.

The Criminal Courts, unlike the Civil Courts, are not bound to record the reasons for their judgments or anything beyond the finding, as exemplified in Chapter XXVI of the Criminal Procedure Code, and the issue for trial before them is always the simple one, is the prisoner guilty or not guilty of the offence with which he stands charged.

In the present case, strictly speaking, the prisoners did not plead an *alibi*, but pleaded not guilty, and endeavored to convince the Magistrate that they were not guilty by showing that, at the time when the offence was said to have been committed, they were in another place, in which case it would be impossible for them to have committed the offence. The Magistrate, believing the evidence which declared them to have committed the offence, necessarily disbelieved the counter-evidence which declared them to have been in another place. I do not think it was necessary for him to say so in detail, still less was it necessary for the Sessions Judge, in confirming the sentence, to express any such opinion.

I think, therefore, the Court cannot interfere.

The 12th February 1864.

Present:

The Hon'ble W. S. Seton-Karr and L. S. Jackson, *Judges.*

Charge (of Judge)—Dacoity.

Criminal Appellate Jurisdiction.

Queen *versus* Bonomally Ghose and others.

Tried by Mr. A. Pigou, the Sessions Judge of Hooghly, on a charge of dacoity.

In a case of dacoity the Judge should direct the Jury to convict only if they find that all the prisoners had the intention of causing wrongful loss to the prosecutor.

Seton-Karr, J.—THIS is an appeal from a conviction of dacoity on a verdict by a Jury, and the appeal can of course only be on a point of law.

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It is urged by the Counsel for the appellant that the Judge misdirected the Jury in telling them that they must find the prisoner guilty of dacoity, *because* the evidence showed that five persons together conjointly committed robbery *with the intention of causing wrongful gain to Peezeer.* It is argued that the evidence shows clearly that there had been some dispute between the plaintiff and Peezeer, who are closely connected with each other, and that it is not shown by that evidence, neither is it deducible therefrom, that all five persons went to the spot with the deliberate intention of causing wrongful gain to Peezeer. Some of them at least, and indeed every one but Peezeer, may have very fairly believed that the two bullocks carried off really belonged to Peezeer, and should not, in the partition of the property, have been made over to the woman Saffee at all. Therefore, in not putting this point of the knowledge and intention on the part of the appellants forcibly to the Jury for their consideration, and in telling them that, if they believed the evidence (as they were quite competent to do, and of which they were the sole judges), they *must* convict of dacoity, the Judge erred, and the appellants are entitled to the benefit of a misdirection.

A consideration of the main evidence and of the charge to the Jury leads me seriously to question the propriety of the conviction for dacoity. It certainly does sometimes happen that men who take the law into their own hands, as in this case, or who commit illegal acts, may eventually find themselves involved technically in serious crimes known to the law, from which they find it difficult to escape; and it was unquestionably wrong of Peezeer to resort to force for the abduction of the two bullocks, and in Bonomally especially to strike the plaintiff a violent blow.

But the facts disclosed by the evidence will never lead me to the conclusion that the offence of which these appellants are guilty is dacoity in the sense in which that serious crime is practically understood and treated. Even if another Judge should hold that the strict and legal definition of dacoity does include these appellants, I still think that a sentence of seven years is quite disproportionate to their offence, looking to the origin of the same, as admitted by the plaintiff herself, and to the nature of the injuries received by the plaintiff, which, after all, are not excessive or permanent.

I should think that a sentence of six months' rigorous imprisonment on Peezeer and Bonomally would be quite sufficient, and of three months for the remaining prisoners. I would alter the conviction to one for causing hurt and for a common assault under Sections 323 and 352.

Jackson, J.—I agree that the Judge ought to have put it clearly to the Jury to find whether or no all the persons engaged in the commission of this offence had the intention of causing wrongful gain to the prisoner Peezeer, or wrongful loss to the prosecutrix; more especially as this is a case which can only be called a dacoity by the most rigorous application of the terms of the Penal Code. It is more than possible that the Jurors might have found that the persons who accompanied Peezeer on this occasion were under the belief that he was claiming property to which at least he believed himself to have a just title.

The act of the prisoners would not the less have been highly unlawful, but it would not have been dacoity if the Jury had so found.

We cannot, however, it seems to me, under such circumstances, take to ourselves the functions of the Sessions Court and Jury, and alter the conviction as if the Judge had correctly charged the Jury and they had found under his direction something less than dacoity.

If the finding of dacoity is to be got rid of, or to be re-opened, I think the only course would be to order a new trial under the concluding words of Section 405 Criminal Procedure Code. But the appellant's Counsel does not ask this course to be taken, and informs me that he would prefer that the conviction should stand accompanied by the Court's remarks, and that a mitigated sentence should be passed.

Upon these grounds I concur in passing, in substitution for the sentence passed by the Court of Sessions, that proposed by Mr. Justice Seton-Karr.

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The 18th February 1864.

Present:

The Hon'ble C. Steer, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

False Evidence—Locus pœnitentiæ.

Criminal Appellate Jurisdiction.

Queen *versus* Gullie Mullick and another.

Tried by Mr. O. Toogood, the Sessions Judge of Cuttack, on a charge of giving false evidence.

Held by the majority of the Court (Jackson, J. dessenting) that there ought to be a *locus pœnitentiæ* for witnesses, who have deposed falsely, retracting their false statements.

Seton-Karr, J.—THIS is not a satisfactory case. The prisoners were witnesses in a case of culpable homicide, which resulted in the conviction of one of the two persons arraigned on culpable homicide not amounting to murder.

The present appellants, after having given evidence in support of the prosecution, admitted they had not seen what they had professed to see. On this the Sessions Judge tries and finds them guilty of having given false evidence, which might have led to the conviction of the persons charged with culpable homicide, on a capital offence. Unquestionably, had the charge of culpable homicide utterly broken down, this would have been a very serious offence; but as the Judge in his separate finding, which accompanies the present appeal, did convict one of these other parties on other legal evidence, it must be presumed, not that the present appellants were instrumental in getting up a false case, but that they either committed the offence of lending themselves to the support of a charge undoubtedly true but of which they could know nothing positively, or that for some motive favorable to the persons accused of the capital offence, they retracted their statements, or that at last from fear of punishment, or from qualms of conscience, they thought fit to speak the truth. The latter view may fairly, I think, be taken in this case.

In any view, the case against them is not of the same grave complexion as if, on some charge utterly without foundation, they had lent themselves to work the ruin of an enemy or a neighbour; and I must hold, as we have held in similar cases, that there ought to be a *locus pœnitentiæ* for persons so circumstanced, and that it is better that a witness should on cross-examination admit the falsity of his previous deposition than that he should persist in swearing to his falsehood. According to the Judge's view of the case, these appellants had much better have stuck to their falsehood to the end, in which case apparently nothing could have been done to them, nor would the case against the men arraigned for murder have been in any way altered.

In this view, not deeming the Judge to have at all borne out his conclusion as to the extreme gravity of the offence of which he has convicted the appellants, and holding that men should not speak with an halter round their necks, but should be encouraged to tell the truth even at the eleventh hour, I would, as a sufficient punishment for the false swearing which they did at last retract, and as a warning to others, reduce their sentence to six months' rigorous imprisonment.

Jackson, J.—I think the prisoners ought not to have been convicted under the 195th Section of the Penal Code.

They gave false evidence before the Magistrate in a preliminary enquiry, of which evidence the immediate effect was to cause the accused persons to be committed for trial.

The retraction of this false evidence before the Court of Session appears to negative the intention of procuring the accused persons to be convicted. I would therefore alter the conviction to one of giving false evidence in a judicial proceeding punishable under Section 193.

As to the measure of punishment, although I think the sentence passed by the Court of Session to be under the circumstances of the case excessive, yet I cannot concur in so large a reduction as that proposed by Mr. Justice Seton-Karr.

It appears to me rather a dangerous doctrine that a man may falsely depose before a Magistrate that he has seen A. B. commit murder, and that, by availing himself of a *locus pœnitentiæ* at the trial, he may have his punishment reduced to an almost nominal penalty.

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I think the promulgation of such a doctrine would go far to embolden persons to swear falsely before Magistrates, because they could afterwards judge whether it would be safe to persist in the perjury or to recant.

And in such a case the false witness might die before the trial, or might remove himself to such a distance that his attendance could not be procured at the trial; in either of which cases his deposition (if it had been duly taken in presence of the accused) would be read as evidence at the trial, and the accused person might be convicted mainly upon it.

No doubt, if in such a case it appeared that the witness when called at the trial had from the prickings of conscience determined to tell the truth, that circumstance might be accepted as an indication of his desire to make all possible amends for the wrong he had done, and might be considered in mitigation, as the restoration of ill-gotten property has been considered in cases of criminal breach of trust; but it seems to me eminently unsafe that a witness, deposing on facts of vital importance, should be in any degree encouraged to depose falsely by the contemplation of his *locus pœnitentiæ* at the trial.

It is said that, if we do not hold out this chance, false witnesses will not retract but will persist in their false statements; but of this, I suppose, we must take our chance. We have not one scale of punishment for confessing offenders, and another for those who plead not guilty, although in many cases the conviction would be impossible without the confession.

I think it better to check perjury at the outset by making men feel that, by giving evidence false but retractable, they expose themselves to the full penalty for that offence, than to improve the chances of convicting them by holding out a motive to retract.

For these reasons I cannot think it right to pass a less sentence on the prisoners than rigorous imprisonment for three years.

Steer, J.—I have in other cases held such a decided opinion as to the danger of punishing witnesses for giving false evidence because they do not adhere before the Sessions to the statements made by them to the Magistrate, that I would rather that my colleague Mr. Justice Seton-Karr had proposed to exempt the prisoners from any further imprisonment than what they have already undergone. As, however, both Mr. Justice Seton-Karr and Mr. Justice Louis Jackson concur in awarding some punishment to the prisoners and only differ as to the measure, I can, with the views I hold, take no other course than give my voice in favor of the most lenient sentence.

The 19th February 1864.

Present:

The Hon'ble C. Steer, *Judge.*

Right of private defence.

Criminal Appellate Jurisdiction.

Queen *versus* Nowabdee and others.

Tried by Mr. W. B. Buckle, Sessions Judge of Backergunge, on a charge of rioting.

The right of private defence cannot be pleaded by persons who, believing they will be attacked, court the attack.

THE facts found are that prisoners 93 and 94, having reason to apprehend an attack, stood outside their house. Presently the attacking party came, when words arose, and then blows followed on both sides. Those who attacked are no doubt guilty in the greatest degree, and they have been properly punished more severely than the other side. This side are not without blame also, as it seems they courted the attack, and instead of staying within doors when, if their house had been attacked, they would have had a right of defence, they went outside and there met the assailants. I see no reason to interfere with the sentence passed on each side respectively, and the appeal is accordingly rejected.

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The 22nd February 1864.

Present:

The Hon'ble C. Steer and W. S. Seton-Karr, *Judges.*

Possession of forged document.

Criminal Appellate Jurisdiction.

Queen *versus* Lokenath Shaha.

Tried by Mr. F. B. Simson, Officiating Sessions Judge of Mymensing, on a charge of having possession of a document knowing it to be forged with intent to use it as genuine.

It is not sufficient for a conviction under Section 474 of the Penal Code to say that the prisoner might possibly have used an altered document. The guilty intent must be proved, not inferred.

Seton-Karr, J.—We are of opinion that this conviction cannot be sustained. Taking all the facts as found by the Judge, and even admitting that the prisoner did know that erasures and alterations had been made in the date of his petition, we hold that the Judge was not justified in drawing the inference which he did draw as to the guilty intent. The words used in Section 474 are copulative and not sejunctive, "knowing the same to be "forged *and* intending that the same shall be "fraudulently or dishonestly used as genuine, "&c." It is not sufficient for conviction to say that the prisoner might possibly have used the altered document in his defence in the Civil suit in the Moonsiff's Court.

This is mere suspicion or surmise, and cannot be converted into a legal presumption of guilt in such a case, looking to the conduct of the prisoner, who appears to have readily returned the petition to the Magistrate when asked for it.

We annul this conviction, and direct the prisoner's release.

The 22nd February 1864.

Present:

The Hon'ble C. Steer and W. S. Seton-Karr, *Judges.*

Abetment of Murder—Kidnapping—Rioting.

Criminal Appellate Jurisdiction.

Queen *versus* Askur and another.

Tried by Mr. W. B. Buckle, Sessions Judge of Backergunge, on a charge of abetment of Murder, Kidnapping, &c.

There can be no conviction for abetment of murder without proof of murder.

A husband or those who aided him cannot be convicted of kidnapping for taking away his own wife; but they are guilty of rioting if they carry out the husband's object of getting possession of his wife by force and violence and in the darkness of night.

Steer, J.—The case against the prisoners as held to be proved by the Sessions Judge is this :—

One Bholaie was married to a girl named Poornee. She, being too young to cohabit with him, continued to live with her mother, the prosecutrix. Bholaie was not satisfied with this arrangement, but the prosecutrix could not be prevailed upon to give the girl to her husband. Bholaie determined to get her, associated with him his brotherin-law Towfeer, the prisoners, and others, and these all at 4 o'clock in the morning went to the prosecutrix's house and carried off the girl. They were seen by several persons carrying off the girl, but no one saw her afterwards, and a head and some bones of a child were some days afterwards found, which the mother and others have identified as those of the girl Poornee. These are the bare

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facts of the case as established by the evidence, and upon these the Sessions Judge holds the prisoners guilty, 1*st*, of abetment of murder ; 2*nd*, kidnapping Poornee ; 3*rd*, riot ; 4*th*, house trespass ; and sentences them, on the first charge, to transportation for 14 years. There is no evidence of any kind to show that Poornee was murdered. That she is dead is probably the case, but how she died, or that she died a violent death, is not shown by a particle of evidence. The conviction for abetment of murder cannot therefore stand.

Nor do the circumstances, under which the girl Poornee was taken away, establish the offence of kidnapping. She was taken away by her own husband, and a husband may certainly be presumed to have believed in good faith that he was entitled to the lawful custody of his own wife. Therefore, if the offence of Bholaie was not kidnapping, neither can it be kidnapping in the prisoners who only aided Bholaie. The conviction upon this charge we also hold to be bad.

But we think the charge of rioting is made out, for, though Bholaie had a legal right to the possession of his wife, the object ought to be legally carried out. It was not a legal way of carrying out Bholaie's object of getting possession of his wife to do so with force and violence and in the darkness of night, and it is entirely owing to this illegal mode of carrying out an otherwise legal object that it has come to pass that the fate of the girl Poornee remains a mystery.

The conviction for riot resting on legal grounds, we uphold the conviction and the sentence of two years' rigorous imprisonment and a fine of 50 rupees, which the Sessions Judge has awarded against each of the prisoners.

The 22nd February 1864.

Present :

The Hon'ble C. Steer and W. S. Seton-Karr,

Judges.

Witnesses (Examination of).

Criminal Appellate Jurisdiction.

Queen *versus* Affazuddeen and another.

Tried by Mr. W. B. Buckle, Sessions Judge of Backergunge, on a charge of rioting.

It matters not how often the same offence is the subject of a Sessions trial, but every accused has a right to have the whole of the evidence given and recorded in his presence just as if the witness had never before given his testimony on the charge.

Steer, J.—In this case the Sessions Judge has not taken the evidence of the witnesses afresh in the presence of the accused, as to the facts upon which the charge against them rests ; but having the witnesses before him, he allows them to identify the prisoner as the party alluded to by them in some former trial of some other person. This is a highly improper and an illegal way of taking evidence, and it does not appear that the depositions of the witnesses formerly given were even read over to the witnesses on the trial of the prisoners. As often remarked by this Court, it matters not how often the same offence is the subject of a Sessions trial ; every accused has a right to have the whole of the evidence given and recorded in his presence, just as if the witness had never before given his testimony on the charge.

The trial must therefore be quashed, and the case remanded to the Sessions Judge for a new trial.

The 24th February 1864.

Present :

The Hon'ble C. Steer and W. Morgan,

Judges.

Illegal Marriage—Abetment.

Criminal Appellate Jurisdiction.

Queen *versus* Kudum and others.

Tried by Mr. W. B. Buckle, Sessions Judge of Backergunge, on a charge of marrying during the life-time of a husband, &c.

Proof of dishonest or fraudulent intent is necessary for a conviction under Section 496 of the Penal Code of falsely going through the ceremony of marriage.

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The mere act of allowing the marriage to take place at one's house does not amount to the abetment of an illegal marriage.

Steer, J.—It seems pretty clear that the woman Arabjan, having a husband alive, did contract a second marriage with Kudum Gazee, the ceremony taking place in Sheik Omer's house. She says she was divorced, but no evidence was given of this, nor did the Judge question the first husband on this important plea, though the husband was examined as a witness on the trial.

On the above facts the Judge has convicted Arabjan under the 494th Section of the Penal Code of marrying again during the life-time of her husband, and sentences her to rigorous imprisonment for three years.

He has convicted Kudum Gazee and Arabjan of having dishonestly and with a fraudulent intent gone through the ceremony of being married, knowing that they were not thereby lawfully married, and he sentences Kudum to three years' rigorous imprisonment, and imposes on him a further fine of 30 rupees. He has convicted Omer of having abetted the commission of the above offences, and he sentences him to be rigorously imprisoned for three years, and to be fined 20 rupees.

In respect to the finding against Kudum and Omer, we think the Judge is altogether in error. Kudum Gazee may have contracted the marriage, knowing that Arabjan's husband was still alive; but unless he did it dishonestly and with a fraudulent intent as explained by Sections 24 and 25 of the Penal Code, he has not committed the offence described in Section 496 under which the Judge has convicted him, and there appears to have been neither a dishonest nor fraudulent intent on his part according to the meaning attached to those words.

Then as to Omer, even allowing that he knew Arabjan was already married and that she had not been divorced, the mere act of his allowing the marriage to take place in his house does not amount to the abetment of an illegal marriage as the law construes abetment. The Section which comes nearest to his case is Section 120 of the Penal Code, but inasmuch as it was not his duty to give notice of the intended marriage, or to put a stop to it, neither does this Section apply to him. In the case then of both these prisoners, we reverse the conviction.

Arabjan has probably committed the offence, of which the Judge has convicted her, but seeing that her husband has cast her off for some years during which time she has had a child by another man, which event, together with everything else connected with his wife, he seems to have treated with the utmost unconcern, we think that though in the eye of the law Arabjan has committed an offence which is punishable by imprisonment, she is deserving of a very small measure of punishment. Having been in jail since the 22nd August last, we consider that she has been punished as much as she deserves, and we accordingly annul the rest of her sentence.

The 29th February 1864.

Present:

The Hon'ble C. Steer and W. S. Seton-Karr,

Judges.

False Evidence.

Criminal Appellate Jurisdiction.

Queen *versus* Govind Sahoo.

Tried by Mr. O. Toogood, Sessions Judge of Cuttack, on a charge of giving false evidence.

The denial of one's relationship to his brother whose witness he was, was held to be a kind of false evidence meriting only a mild punishment.

Steer, J.—There is no doubt that the prisoner has committed the offence of making a statement that was false, and his object would seem to be that, by denying his relationship to his brother whose witness he was, his statement would have more weight. This kind of false evidence is in my opinion the mildest form in which false evidence can be given, and I would not therefore visit this offence with a measure of punishment suited to the offence in its worst form.

I would reduce the sentence from three years to six months.

Seton-Karr, J.—I fully concur. A sentence of three years is out of all proportion to the offence.

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The 2nd March 1864.

Present:

The Hon'ble W. S. Seton-Karr and L. S. Jackson, *Judges.*

False Evidence.

The Queen *versus* Chota Jadub Chunder Biswas.

Committed by Mr. W. S. Wells, Magistrate of Bancoorah, and tried by Mr. G. C. Fletcher, Sessions Judge of West Burdwan, on a charge of intentionally giving false evidence.

Where a plaintiff before a Moonsiff came and petitioned the Judge complaining that the Moonsiff had improperly refused to examine his witnesses and had dismissed his suit, although informed that witnesses were in attendance, and the Judge upon examining the petitioner upon solemn affirmation, and finding the charge unproved, ordered proceedings to be taken against the petitioner for giving false evidence,—HELD that the Judge had no authority to examine the petitioner upon oath in such a case, and that the oath having been made, and the evidence given *coram non judice*, could not form the subject of a prosecution for false evidence.

Jackson, J.—THE prisoner has been convicted of giving false evidence in a stage of a judicial proceeding.

The so-called evidence was given before the Civil Judge of the district under the following circumstances :—

The prisoner, who had been plaintiff in a civil suit before one of the District Moonsiffs, came before the Judge and complained by petition that the Moonsiff had improperly refused to examine his witnesses and dismissed his suit, although informed that the witnesses were in attendance.

The Judge hereupon examined the petitioner upon solemn affirmation, and, finding the charge unproved, ordered proceedings to be taken against him for giving false evidence.

It appears to me that the Judge had no authority to examine the petitioner upon oath in such a case ; that the oath was therefore made, and the evidence given *coram non judice* ; and that, consequently, they cannot form the subject of a prosecution under Section 193 of the Penal Code.

I, therefore, think the conviction erroneous, and the prisoner entitled to an immediate release.

I have not come to this conclusion without an attentive consideration of all the provisions on this subject discoverable in the Regulation Law, or without hearing what the Government pleader had to urge. I have also consulted several of my learned colleagues.

Seton-Karr, J.—Looking to the circumstances under which the charge was preferred against the Moonsiff by the appellant, I think that the correct course would have been for the Moonsiff, if aggrieved, to have brought an action for defamation under Section 499 of the Penal Code, or to have sued civilly for damages. Judicial officers, if they have been unjustly aspersed, and if they have grounds of complaint, are entitled to some protection or redress. But on the facts and for the reasons mentioned by Mr. Justice Jackson, I concur in the release of the appellant. The Judge should not have taken up the case, and committed and tried it as he did.

The 8th March 1864.

Present:

The Hon'ble Shumbhoonath Pundit, *Judge.*

Charge (of Judge.)

The Queen *versus* Mahadeo.

Convicted by the Sessions Judge of Patna on a charge of culpable homicide not amounting to murder.

Where different trials are held at different times and against different prisoners in respect of the same crime, a new charge, specifying the particulars required by Circular Order No. 5, dated 6th February 1863, should be delivered in each case.

THIS is a case of a prisoner tried for a crime for participation in which other prisoners have already been tried and punished before by the same Sessions Judge who has now passed sentence against the present prisoner.

In the present case the Judge did not give a new charge to the Jury trying the case, but only read over to them his charge to the former Jury.

This is evidently illegal ; and, if I had been satisfied that the prisoner has any how suffered by this proceeding of the Judge below, I would have tried to see whether the trial could not be quashed at all for this defect. It is, however, clear that, as regards this case, it would have taken as much time and labor to give a new charge as it took to read out the former charge ; and that also the former charge on the whole was applicable to the present suit. As the sentence has by this time expired, and as putting the prisoner to undergo a new trial will only put him in fresh uneasiness, I do not like to interfere. The Sessions Judge is, however, to be requested to deliver formally a new charge

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in such cases as the present, and when delivering judgment, to specify the particulars required by the Circular Order No. 5, dated 6th February 1863, as he had done in the former case.

The 14th March 1864.

Present:

The Hon'ble G. Loch, C. Steer, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

False Evidence.

The Queen *versus* Anoo and another.

Committed by Mr. G. C. Kilby, Deputy Magistrate of Nassirnuggur, and tried by Mr. A. A. Swinton, Sessions Judge of Tipperah, on a charge of intentionally giving false evidence, &c.

Held by the majority of the Court that a sentence of 5 years' imprisonment was not excessive in the case of a man convicted of making a false statement in a judicial proceeding, with the intention of defeating the ends of justice by procuring the acquittal of a guilty person.

Steer, J.—A CHARGE was made against Torikollah that he had eaten a stray one-eyed bull. Torikollah in that case made answer that he had not killed or eaten the bull, but that he had made it over to the owner Anoo. This Anoo was sworn, and he stated that he had received the beast from Torikollah in the presence of Nazir and Shorafat. Anoo, when asked where the bull was, said it had died. As his wife and son had told the Police that Anoo never had such a beast, the Magistrate sent for the wife and all the males of the village in which Anoo lived, to question them as to their knowledge whether Anoo ever had such an animal. They denied that Anoo ever had such a bull as that he said he received from Torikollah; and upon that Anoo, seeing the proof of his falsehood, is said to have confessed his guilt.

Upon these facts the Judge finds Anoo guilty of perjury in saying falsely that he received a one-eyed bull from Torikollah, and he finds Torikollah guilty of having used as true and genuine evidence the evidence of Anoo, knowing it to be false.

The confession of Anoo before the Magistrate is not with the record, but a memorandum of it in the Magistrate's hand is. It is not, however, on his confession alone that Anoo was committed for trial, but on the evidence of his wife and of his fellow villagers, that he never had such a bull as that which he affirmed he received from Torikollah.

Does this prove that what he said as to Torikollah having given him a one-eyed bull is false? It might be that his witnesses failed to prove that he had previously possessed a one-eyed bull, but does that negative the assertion that he received a one-eyed bull from Torikollah? Certainly, if he never possessed a one-eyed bull, the animal of that sort which he did receive from Torikollah could not have been his, and, in this respect, his statement may be false; but this is not the false statement of which the Judge has convicted him. Therefore, it seems to me that there is no evidence to support the Judge's finding against Anoo, and he ought to be acquitted.

The Judge has found that Torikollah made use of the false evidence of Anoo, which is manifestly an error; for he has made no use of it at all. He made his own statement and got Anoo to support him, but he made no further use of Anoo's statement. The offence, then, of which Torikollah is guilty, if he is guilty at all, is not the offence of using Anoo's false evidence, but of instigating Anoo to give false evidence. If there is proof of this, he is guilty of abetting Anoo to give false evidence.

The Magistrate says that it was clearly proved that the bull was killed by Komoruddeen in presence of Torikollah. If this was so, this fact would convict both Anoo and Torikollah; but this evidence is not sent up to the Sessions. Therefore the only ground for inferring that Torikollah did not give the bull to Anoo, is the evidence of Anoo's witnesses that they never saw him possessed of such a bull.

This can never be considered sufficient evidence that Torikollah did not, in fact, give the one-eyed bull to Anoo; and this is the false statement which the Judge convicts the prisoner Torikollah of having made corrupt use of. If there is no proof that it is false, there is no offence, and there has in fact been none. I would, therefore, acquit this prisoner also.

It should, I think, be brought to the notice of both the Deputy Magistrate and the Judge that, in such a case as this, it is highly improper to call a wife to convict her husband of perjury; and, except in civil cases, a wife is not a competent witness for or against her husband.

Seton-Karr, J.—I concur in reversing the conviction of the appellant Torikollah. The charge against him was not correctly framed, and I do not think that the evidence

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would support the proper charge, *viz.*, that he instigated Anoo to give false evidence. What Torikollah said, in the first instance, was merely said in his own defence.

As regards Anoo, his statement as to the receipt of the one-eyed bull is manifestly false, and he has admitted that he spoke falsely, for his answer, as recorded in the brief memorandum of the Deputy Magistrate, is tantamount to an admission of guilt. This answer, however, contains nothing about the hope of any reward being the motive for the falsehood. I do not think that Anoo ought to escape without some punishment, though I admit that 5 years seem excessive, compared with the character of the offence ; and, looking to the fact that he did admit the falsity of his statement, I can here only repeat what this Court has ruled in several instances of late, *viz.*, that, if truth can be extracted from witnesses even at the 11th hour, we should not punish them with the same rigor, as we punish those who persist in their falsehood to the end, or who endeavor to ruin the character, or imperil the lives and liberties of their neighbours. In this view I think the sentence of 5 years excessive.

We are not told what punishment was awarded to the men who made away with the bull, and who were separately tried ; but, on the whole, I would reduce the sentence of Anoo to one year's rigorous imprisonment, looking to the probable object with which he swore falsely, for I infer that he chiefly intended to procure the release of Komoruddeen and Torikollah, and to make out that the animal had not been eaten.

Jackson, J.—My two colleagues have disposed of the case of Torikollah, and I have only to give an opinion as to the prisoner Anoo.

I concur with Mr. Justice Seton-Karr in considering this appellant to have been properly convicted.

The Sessions Judge finds him guilty of having falsely made the whole statement specified in the charge, and not merely of having falsely stated that Torikollah had made over to him the one-eyed bull.

The whole of the statement must be taken together, and the obvious intention with which it was made must be considered. That statement was (in substantial agreement with the words of the charge) that his, Anoo's, one-eyed bull having strayed, he, Anoo, had received it back from Torikollah, and that the beast had afterwards died of disease.

That statement made in a case when Torikollah was charged with having made away with a bull answering the above description, was obviously made with the intention of inducing the Court to believe that the animal traced to Torikollah's possession was, not one belonging to the prosecutor in that case and wrongfully made away with by Torikollah, but one belonging to Anoo himself, and properly made over to him by Torikollah.

Now, when the evidence established beyond a doubt that Anoo had never possessed such an animal at all, even if we suppose it to have been proved that Torikollah made over a one-eyed bull to Anoo, the evidence of Anoo will, notwithstanding, continue to be false, with reference to its whole tenor, and bearing on the case in which it was given.

Besides he seems to have admitted to the Magistrate that his entire statement was false.

I therefore think that he was quite properly convicted of the offence of giving false evidence in a judicial proceeding.

It also appears that he did so in expectation of receiving a money reward.

We therefore have the case of a man who has committed a most deliberate act of perjury from the most sordid motive, and with the intention of defeating justice by procuring the acquittal of a guilty person.

I cannot find in these circumstances any ground for reducing the sentence to one of imprisonment for one year. It may be that five years is a term slightly in excess of the sentence which we might have been inclined to pass, but I am not at all sure that it is so; and, at all events, I see no reason for weakening the Judge's authority by a trifling mitigation. I would, therefore, confirm the sentence of five years' imprisonment.

Loch, J.—Komoruddeen and Torikollah were charged by one Jenab Ally with killing and eating a stray bull which had been made over by the villagers to Torikollah, the village chowkeedar, to take to the pound.

In his defence Torikollah denied the charge, and alleged that he had made over the bull to its owner, one Anoo, in the presence of witnesses.

Anoo was examined by the Deputy Magistrate on the 2nd September, and he swore that the bull in question was his ; that it had strayed in the month of Kartick ; that in the month of Ughran he had discovered it at Mouzah Seydtola ; that, on

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his bringing witnesses to prove his title to the animal, it was made over to him by Torikollah, and that the animal died in the following Jeyt.

From the statement of the Deputy Magistrate it appears that the charge against Komoruddeen and Torikollah was satisfactorily proved, but he has failed to submit any evidence of this fact in this case.

The witnesses called by Torikollah and Anoo to prove the delivery of the bull to the latter deny all knowledge of the transaction. Further, it appears, from the evidence of the neighbours, that Anoo never possessed such an animal as that in question, and, consequently, his statements of having lost and recovered the animal are altogether false; and, when examined by the Deputy Magistrate, with a view to commitment, he admitted that he had committed perjury, and that he had given the false evidence under promise of receiving 25 rupees from Korum Ally.

This false statement was knowingly made by Anoo for the purpose of effecting the release of Torikollah and defeating the ends of justice; and I do not think that, under the circumstances, he has been too severely punished. I would uphold the sentence of the Sessions Judge.

The 15th March 1864.

Present:

The Hon'ble L. S. Jackson and E. Jackson, *Judges.*

Evidence (Mode of recording)—Section 195 Code of Criminal Procedure.

The Queen *versus* Muttee Nushyo.

Committed by Mr. V. T. Taylor, Officiating Magistrate of Rungpore, and tried by Mr. F. C. Fowle, Sessions Judge of that District, on a charge of murder.

A memorandum by a Judge that certain witnesses had deposed the same as the former witnesses, is not in accordance with the requirements of Section 195 Code of Criminal Procedure.

E. Jackson, J.—We confirm the sentence of death passed upon the prisoner Muttee Nushyo, and direct that it be carried out without delay.

We would point out to the Judge that he has not, in accordance with Section 195 of the Criminal Procedure Code, made a memorandum of the substance of what the witnesses No. 4 and No. 5 deposed to, as the examination of those witnesses proceeded. His memorandum is that those witnesses deposed as the former witnesses had. This is not a sufficient compliance with the law.

The 16th March 1864.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Appeal—Conviction by Superintendent of Cachar.

The Queen *versus* Radhakissen Sein and another.

Convicted by Captain R. Stewart, Superintendent of Cachar, of criminal breach of trust.

The High Court has no jurisdiction to hear an appeal from a conviction and sentence by the Superintendent of Cachar in his capacity of Magistrate of the District.

This is an appeal from a conviction and sentence by the Superintendent of Cachar in his capacity of Magistrate of the District.

The Court have no jurisdiction to hear such appeals, and the record must, therefore, be returned to the Magistrate to be submitted to the proper Court.

The 31st March 1864.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Jurisdiction—Bail.

The Queen *versus* Jhaloo Sirdar.

Committed by Baboo Judoonath Mullick, Moonsiff of Pubna, and tried by Mr. C. S. Belli, Sessions Judge of Rajshaye, on a charge of using evidence knowing it to be fabricated.

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A single Judge of the High Court may order the release of a prisoner on bail pending the hearing of an appeal.

Jackson, J.—THE prisoner has been convicted of using as genuine evidence a fabricated bond, and has been sentenced to five years' imprisonment and a fine of 500 rupees, or an additional year's imprisonment.

The commitment was made by the Moonsiff of Pubna, in whose Court the bond had been produced as evidence by the prisoner in a suit preferred by the prisoner against Madaree Mundul and Bhoyrub Chunder Sircar. The action was brought to recover from the above named defendants the amount due, principal and interest, on two other bonds executed jointly by them on the 30th Assin 1267. Madaree Mundul admitted the claim; Bhoyrub Chunder Sircar admitted that the bonds had been executed by Madaree Mundul and himself, but added that the greater portion of the debt had been paid, in proof of which he produced a receipt dated 11th Pous 1267, in the handwriting of the prisoner for Rs. 122, to attest which he requested that the prisoner might be personally summoned. The prisoner accordingly attended. He admitted that he had written the receipt, but alleged that it had been given to Madaree Mundul on account of another bond which Madaree Mundul singly had subsequently executed in his favor on the 5th Aughran 1267, in proof of which he, four days afterwards, filed the bond, which it is now alleged he had forged. The bond, though dated in 1267, is written on a stamped paper which was purchased in 1268. The circumstance was at once discovered. Bhoyrub Chunder Sircar charged the prisoner with having, in collusion with his relation Madaree Mundul, fabricated this false bond. The Moonsiff decided the civil action by giving Bhoyrub Chunder Sircar credit for the sum paid in the receipt, and ordered that enquiries should be instituted as regards the forgery bond, with the view of bringing the prisoner to trial. These enquiries were protracted in the Moonsiff's Court from July 1862 to April 1863, and they resulted in the prisoner's commitment to the Sessions Court.

The prisoner's defence is that the bond in question was found among his other bonds and papers which were in charge of his gomashta, and had been filed by him under the belief that it was the genuine bond which had been executed by Madaree; that he had since ascertained that the original bond had been lost, and that his gomashta had substituted this false bond in its place. The gomashta in question had lately died; but there was evidence brought forward to prove that the original bond had been lost, and Madaree Mundul deposed that the gomashta had mentioned the fact to him, and asked him to execute another bond, but that he had refused.

The assessors were of opinion that this defence was true, and that the prisoner was not aware that the bond he was filing was not the real bond. The Judge, however, took a different view of the case, and, disbelieving the defence, convicted the prisoner.

The argument urged by the vakeels of the prisoner before this Court is that it is in the highest degree improbable that the prisoner, who, it is admitted, is a wealthy muhajun, would deliberately file such a palpably false bond, which he must have known would be subjected to scrutiny, and which the smallest examination would at once prove to be false; and that, on the other hand, the defence set up by the prisoner is quite consistent with probability, and is further proved by direct evidence.

There is no denial that the prisoner attempted to use the bond as genuine evidence. The question is whether the bond is false, and whether the prisoner knew that it was false when he produced it in Court.

There is great weight in the argument used by the prisoner's pleaders. The amount of the claim was not large. The prisoner is not a poor man, that it would be any great object with him to obtain the money he demanded. The first glance or examination of the document would prove that the bond was not written at the date alleged in it. The forgery was, in fact, discovered the moment the bond was filed. The defendant Bhoyrub Sircar was contesting the claim, and the prisoner must have known that the bond would be subjected to scrutiny. It is, therefore, difficult to believe that he, with a full knowledge of this clear forgery, filed the document, in the expectation that it would be admitted as genuine. The prisoner, when shown the receipt put in by Bhoyrub Sircar, did not deny that that was a genuine receipt. Had he wished to resort to forgery and perjury, such a denial would have been the easiest and most direct mode of doing so. He admitted that receipt, but asserted that it had been given for another

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bond, and, within four days, he filed that bond. There was no great delay, and if in the meanwhile he fabricated a bond on some other paper with the connivance of Madaree, it is difficult to imagine that he would have gone so carelessly to work as to produce a document which would be at once detected to be false.

But the prisoner's guilt depends principally on the question whether the sum alleged to have been lent to Madaree by the prisoner on the 5th Aughran 1267 had really been lent. The money is said to have been borrowed by Madaree in his capacity as Naib of a certain zemindaree, not for personal requirements, but in order to pay in the revenue of the estate in the collections of the rents of which estate he was short. Madaree deposes that he did receive the loan of the 5th Aughran, but his evidence is not worthy of implicit belief, because, it is said, that he is conniving with the prisoner and is his relation. The witnesses to that loan and the execution of a bond for the loan were examined by the Moonsiff, and deposed that such a bond had been executed. The tehsildar, Torrikollah Biswas, also before the Moonsiff admits that, in addition to the sum borrowed jointly by Madaree and Bhoyrub, another sum of money had been borrowed from the prisoner which was still unpaid. These witnesses were not examined by the Sessions Judge. The prisoner's khatta books were not sent for and examined. It is also to be recollected that the receipt is addressed to Madaree Mundul alone, and not to him and Bhoyrub Sircar.

The conclusion which we arrive at on this evidence is that Madaree did borrow the money mentioned in this bond on the 5th Aughran 1267. If so, it is quite possible that the original bond was lost, and that the bond now put in is a second bond prepared by Madaree Mundul, and either the prisoner or his gomashta to take the place of the original bond.* This would not, however, be a false bond, inasmuch as it does not contain a false record of what actually took place. Madaree has denied that he executed this bond, but there seems very little doubt that it is in his handwriting.

The real dispute between the parties was as to which bond the alleged payments should be credited. Bhoyrub Sircar naturally expected that the earlier payments would be credited to the earlier bonds to which he was a party liable. Madaree Mundul, having been in the meanwhile dismissed from his appointment as Naib, would be anxious to have them credited to the bond which he had executed singly. The prisoner would find his interests tally with the views of Madaree, because, as regards the debts from Madaree jointly with Bhoyrub, he would still have a hold on the zemindaree amlah from whom the money was really due by executing his decree upon them against Bhoyrub; whereas, as regards the bond executed by Madaree singly, he might fairly anticipate some difficulty in realising the money from Madaree's successor. It is to be recollected that all three bonds are for money borrowed, not on the personal account of Madaree and Bhoyrub, but to pay in the Government revenue of the estate in their charge, because the collections from the estate were short; and that the money was to be re-paid from the collections when they were made; the interest, also, to be recovered from the ryots who had not paid their rents in proper time. The Sessions Judge lays great stress on the fact that Bhoyrub held the receipt; but, as this receipt would remain in the zemindary cutchery, even after Madaree was dismissed, Bhoyrub would have no difficulty in possessing himself of it.

Looking to all the evidence, we are not satisfied that the prisoner has committed any crime in using the bond as genuine evidence. We are not even satisfied that the bond is false. Though it must have been written after 1268, it may still, and, we believe, does contain a true record of what took place in 1267. We, therefore, acquit the prisoner and direct his release.

With regard to the objections of the Sessions Judge as to the authority of one Judge of the High Court to order the release of a prisoner on bail pending the hearing of an appeal, we are of opinion that Section 420 refers specially to Section 419 of the Code of Criminal Procedure; and that the temporary suspension of an order is neither a modification, amendment, nor reversal of an order; and that, consequently, one Judge was competent to issue the order which Mr. Justice Steer did.

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The 12th April 1864.

Present:

The Hon'ble E. Jackson, *Judge.*

Rioting—Cattle Trespass.

The Queen *versus* Bokoo Sheikh and others.

Committed by Mr. F. H. Elphinstone, Deputy Magistrate of Meherpore, and tried by Mr. A. R. Thompson, Sessions Judge of Nuddea, on a charge of rioting, &c.

The prisoners having been part of an assembly of more than 5 persons, whose common object, as apparent from their acts, was by means of criminal force to recover possession of their cattle seized for trespass (whether properly pounded or not), and who made use of such force and took away their cattle, were held guilty of rioting, and liable to conviction under Section 147 of the Penal Code, and not under Section 11 Act V of 1857.

THE charge against these prisoners was that they had gone in the middle of the night in a large body, to rescue their cattle which had been seized for trespass, and had beaten the chowkeedar who had attempted to restrain them, and left him bleeding and senseless on the ground.

The trial was held with a Jury which found the facts proved, and the Judge, under Section 147 and Section 325 of the Penal Code, sentenced the prisoners to 2 years' imprisonment. The prisoners' appeal to this Court has been conducted by a pleader.

He urges, first, that the cattle were illegally detained in a place which was not a pound, and that no one was found in charge of them, and, therefore, the prisoners and their companions were at liberty to take possession of their own cattle.

I agree with the Judge that it was immaterial whether the cattle were properly pounded or not. They were in the possession of certain persons to whose charge they had been given on account of their trespassing, and those persons were public officers, *viz.* a pound-keeper and a chowkeedar. The former ran off when the prisoners and their party came up. The latter remained at his post, and received a severe beating, one of the bones of his wrist being broken. The prisoners carried off their cattle.

The acts of the prisoners come within the definition of rioting. They were part of an assembly of more than five persons, whose common object, as apparent from their acts, was by means of criminal force to the pound-keeper and chowkeedar to obtain possession of their cattle, of which they had been deprived. They made use of such force, and took away their cattle.

The pleader then urges that the conviction ought to have been under Section 11 Act V of 1857. Had the offence proved against the prisoners been only that of forcibly rescuing their cattle, I think there would have been some force in this objection. The special law would have superseded the Penal Code. But the prisoners are charged with a higher offence than merely forcibly rescuing their cattle. They are charged with committing riot, and the conviction and sentence under Section 147 of the Penal Code is, therefore, right.

The only remaining objection urged is that there may be some doubt as to whether the bone in the chowkeedar's wrist was really broken, but this is a question of fact on which the Jury have decided.

I reject this appeal, seeing no ground for interference in the conviction or sentence.

The 12th April 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Abetment of abduction of a woman —Wrongful confinement.

The Queen *versus* Ishwar Chandra Jogee and others.

Miscellaneous Case.

Convicted by Mr. W. Clementson, Deputy Magistrate of Diamond Harbour, of

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wrongfully confining a woman and of abetment of abduction, and sentenced separately for each of those offences, which conviction and sentence were upheld on appeal by Mr. F. L. Beaufort, Sessions Judge of the 24-Pergunnahs.

The prisoners having been sentenced for abetment of abduction of a woman under Sections 109 and 498 of the Penal Code, and for wrongful confinement of her under Section 343,—HELD that both sentences could not stand, and that, as the essence of the case was abduction, the prisoners, as abettors therein, should be punished for it alone.

Seton-Karr, J.—THE papers in this case were sent for by Mr. Justice Raikes, in order to see whether both sentences could stand in this case, *viz.* that for abetment of abduction under Sections 109 and 498, and that for wrongful confinement under Section 343.

After reading the decisions and hearing the arguments of Counsel, I am of opinion that both sentences cannot stand. The abduction and the concealment and detention of the woman are both parts of the same offence, and should both be included under Section 498 of the Code. The judgments, on the face of them, do not show that there have been distinct offences requiring separate punishments.

But the learned Counsel asks the Court to strike out the conviction under Section 498, in which the appellants have been convicted as abettors of the act of abduction, and he urges that, where two convictions are recorded and one must fall, that in which the appellants are convicted as principals should stand, and that in which they are convicted as abettors should fall to the ground.

I do not think that the law or the justice of the case requires this. This is, as it were, a special criminal appeal on a dry point of law, in which it is only necessary for this Court to consider whether there is a legal conviction, and in which it is undesirable, for obvious reasons of public policy, to interfere with the amount of the sentences, except on pure legal grounds.

There is ample evidence which satisfied both Courts as to the conviction for abetment, and I would, therefore, confine the interference of this Court to a reduction of the period of six months' imprisonment given in excess for wrongful confinement.

The essence of the case is, clearly, the abduction, and for that, as abettors therein, the appellants deserve punishment.

Loch, J.—I agree with Mr. Justice Seton-Karr in thinking that the extra six months should be remitted. The rest of the sentence should stand against all the prisoners.

The 12th April 1864.

Present:

The Hon'ble G Loch and E Jackson,

Judges.

Forgery—Alteration of Collectorate Chellaun.

The Queen *versus* Hurish Chunder Bose.

Convicted by Mr. C. H. Campbell, Sessions Judge of Jessore, on a charge of forgery.

A fraudulent alteration of a Collectorate chellaun is a forgery of a document described in Section 467 of the Penal Code.

Loch, J.—* * * * SECTION 467 (of the Penal Code) enacts, among other things, that whoever forges a document, which purports to give authority to receive or deliver any money shall be punished, &c. Now, what is a chellaun such as is the subject of this case? A Collectorate chellaun is a well known document, and, as its name imports, it is a memorandum of the amount of Government revenue, which the party holding or offering it then proposes to pay in, and it is an authority for him to pay, and the Government officer to receive such revenue. It is prepared either by the party sending the money and is forwarded with it, or, as is more frequently the case, it is prepared by the party

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who actually pays in the money under authority given him, and who is generally the mooktear or agent of the landholder. It recites the number and name of the estate, the name of the intended proprietor, the kist for which the revenue is due, and the sum then intended to be paid in, and it is signed by the party paying it in, either on his own account, or, if an agent, on the part of the owner who has remitted the money to him for that purpose. If it be contended that in itself it is not any authority to receive or deliver money, but is simply a document which, so long as it remains in the maker's hands, he may fashion as he pleases, add to or alter without committing an offence, still there can be no doubt that, when once it has left his hands and been presented to the Collector, and compared in his office, and been marked and signed and registered by the Collector's officers appointed for that purpose, it becomes an authority to the party to pay, and to the treasurer to receive, the Government revenue from him ; and if the party, after having presented that document, fraudulently alter any part, or make any new entry therein, thereby intending to commit fraud, he has, we think, committed a forgery of a document described in Section 467 of the Penal Code. If the chellaun were signed by the sender of the money, and the agent's duty consisted in merely paying in the money according to that chellaun, then clearly that chellaun would be an authority for him to pay money, and any fraudulent alteration of that chellaun would be a forgery of a document described under Section 467. * * * *

The 28th April 1864.

Present :

The Hon'ble G. Loch and E. Jackson, *Judges.*

Right of appeal (to Prosecutor)—Dismissal of complaint.

Reference under Section 434 *of the Code of Criminal Procedure made by Mr. Malet, the Sessions Judge of Beerbhoom.*

Messrs. Lyall and Co. *versus* Sam Mundle.

In a case of dismissal of complaint by a Deputy Magistrate, it was held that a prosecutor had no right of appeal, but ought to have moved the Magistrate to procure, under Section 434 of the Code of Criminal Procedure, a reversal, by the High Court, of the order of dismissal.

Loch, J.—On the 23rd June the Deputy Magistrate, after hearing the evidence of three witnesses in support of the prosecution taken in the presence of one of the defendants, held that the evidence was so discrepant as to be quite insufficient to sustain the charge, and therefore he acquitted the accused without taking his examination, and dismissed the case. The judgment of the Deputy Magistrate has reference to the character of the evidence generally as regarded its sufficiency to support the charge, and not merely as regarded the criminality of the party then before the Court. He found that the evidence was altogether insufficient to sustain the charge. This being the case, it is manifest that such evidence would not be sufficient against any of the parties accused, and, if the prosecutor were allowed to carry on the case, it would be necessary for him to bring forward fresh evidence. But, instead of doing this, he preferred a local investigation which was

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made at his request, and the result of this enquiry being as unsatisfactory as the other, the case was again dismissed.

The question, however, is whether the prosecutor had any appeal in such a case. The Magistrate considers that he had; but I do not find that the Code of Procedure gives a prosecutor whose case has been dismissed any right of appeal. If the Lower Court have acted erroneously, the prosecutor may bring such error to the notice of the Magistrate, and the Magistrate may report the same for the orders of the High Court; but I do not think that a prosecutor has any ight of appeal; and, if this be a correct view of the law, the Magistrate's order should be reversed.

Jackson, J.—I think the Magistrate's order must be reversed. The subordinate Magistrate has authority in a certain class of cases on certain Sections of the Procedure Code to dismiss a complaint. No appeal lies from any such order. The case before the Deputy Magistrate was of that description that he might have dismissed it, and he did dismiss it. He afterwards explained that he did not mean to dismiss it, but only to acquit the one accused who was under trial before him. Still the order he did pass, whatever he meant, was to dismiss the complaint. The Magistrate could not, after such an order, either hear an appeal from it or re-open the case as a new case before himself, without first procuring the reversal of the order passed by the Deputy Magistrate by the High Court on the ground of illegality.

This case shows how important it is that all Officers, exercising Magisterial powers, should, in passing orders, use the phraseology laid down in the Code.

The 29th April 1864.

Present:

The Hon'ble C. Steer and F. A. B. Glover, *Judges.*

Murder—Drunkenness.

The Queen *versus* Ram Sahoy Bhur and others.

Committed by Mr. W. P. Reilly, Deputy Magistrate of Sewan, and tried by Mr. W. H. Brodhurst, Sessions Judge of Sarun, on a charge of murder.

In a case of murder committed in a drunken squabble, it was held that voluntary drunkenness, though it did not palliate any offence, might be taken into account as throwing light on the question of intention.

Glover, J.—THE Sessions Judge has convicted all these prisoners of "murder," and sentenced them to transportation for life.

It appears from the record that the prisoners Nos. 1, 2, 3, and 4, and the deceased went one morning to a grog shop, and spent the entire day drinking. At sunset they set out in an intoxicated state to return home, and on the road fell to quarrelling. The evidence shows that Ram Sahoy, prisoner No. 1, and the deceased began the

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squabble by first abusing, and afterwards striking each other with *lattees;* but the quarrel soon became general, and the deceased was attacked by all the prisoners and knocked down. He died the next morning, the cause of death (according to the native doctor) being rupture of the spleen.

Now, admitting all these facts, I do not think that the prisoner's crime amounts to murder. Voluntary drunkenness does not, of course, palliate any offence, but it is generally taken into account as throwing light on the question of intention, and it can hardly, I think, be contended that there was any "intention to kill" in the present case; nor do I consider that, where all parties to a fight are intoxicated, the question of undue advantage can arise. In this case there seems to have been a sudden and general squabble, and a "sudden fight," originated by Ram Sahoy and the deceased himself, in which eventually the other prisoners themselves heated by drinking took part.

I would convict the prisoners of culpable homicide not amounting to murder, and sentence them each to seven years' rigorous imprisonment.

Steer, J.—I quite agree with Mr. Justice Glover that the offence of the prisoners does not amount to murder, and the sentence of seven years which he proposes is quite an adequate measure of punishment for the nature of the offence established against the prisoners.

The 29th April 1864.

Present:

The Hon'ble G. Loch and C. Steer, *Judges.*

Cheating.

The Queen *versus* Raj Coomar Banerjee.

Tried by Mr. W. T. Tucker, Sessions Judge of Bachergunge, on a charge of cheating.

To induce a son to pay his father's debts, by acting merely on his fear of consequences to his father, is not cheating. To describe those consequences to be more serious than in fact they were likely to be, may be to deceive, but is not cheating if done without any fraudulent or dishonest intention.

Loch, J.—I THINK this conviction cannot stand. The facts may be accepted; but, admitting them, I do not think the prisoner can be convicted of cheating. It appears that Aluk Chunder Banerjee, witness No. 1, had been employed as a tehsildar by Mr. Morrell on the recommendation of the prisoner Raj Coomar Banerjee. It is not shown that Raj Coomar became surety for him.

Aluk Chunder appears to have defaulted, and to have been laid hold of by Morrell; and his friend and relative Raj Coomar was probably also told to exert himself to

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recover what was due from the defaulter. For this purpose he visited Umbica Churn, the son of the defaulter, and pressed upon him the necessity of paying up, and to rouse his filial zeal, probably added one or two dreadful suggestions of what might be done by Morrell, should the son fail to produce the money; and it was under this pressure, I think, that the money was obtained by the prisoner, not for himself, but to make good the amount of the defalcation. It was perhaps not the most legal method of realizing the money, and the prisoner probably stated the truth with exaggerations; but he had not, in my opinion, an intention of cheating the prosecutor out of his money. I would reverse the sentence and release the prisoner.

Steer, J.—I think that there can be no reason to doubt the evidence for the prosecution which states that Aluk Chunder was in a state of restraint under, or by orders of, Mr. Morrell. Nor is there any reason to doubt that Mr. Morrell claimed to have money due to him from Aluk Chunder, and that he was detained pending the settlement of this matter.

While Aluck Chunder was detained at Surruleah, Raj Chunder, a relative of his, went, with or without Mr. Morrell's authority, to his son Umbica, to whom, representing the trouble his father was in, and probably exaggerating the likely consequences of it, induced Umbica to raise and to pay him a sum nearly corresponding to his father's defalcations to Mr. Morrell.

The question is whether the money obtained under the above described circumstances can be said to have been obtained by means which the law designates under the term "cheating"?

To induce a son to pay his father's debts, by acting merely on his fear of consequences to his father, does not seem to me to come within the definition of the crime of cheating. If the father did embezzle any money from Mr. Morrell, his master, there is no doubt that the consequences to him might have been serious. To describe them to be more serious than in fact they were likely to be, may be to deceive; but if a fraudulent or dishonest design, which is an essential element of the crime of cheating, is not apparent in the person deceiving, he does not cheat. Raj Coomar, in prevailing on Umbica to pay his father's debt, may have acted with the best of motives. He may have argued that it is better to get the son to pay the debt, than that matters with the father be pushed to extremities and he be put to jail.

He may have worked upon the fears of the son by purposely describing the consequences of non-payment as much greater than he knew them to be, but it was not with any fraudulent or dishonest intent, and therefore he did not cheat.

I agree that the offence is not made out, and the prisoner must be released.

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The 2nd May 1864.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Murder—Section 380 Code of Criminal Procedure—Sentence—Mitigation.

Queen *versus* Dabee and others.

Section 380 of the Code of Criminal Procedure does not authorize a Sessions Judge to sentence a prisoner convicted of murder to anything less than transportation for life, but only requires the Judge, if he sentence such prisoner to transportation for life instead of capitally, to assign his reasons for so doing. If there are circumstances which render expedient or advisable a mitigation of the sentence required by the law to be passed in such cases, the Judge may record those circumstances and submit them for the consideration of the Government, and the Government may, under Section 54, act as to it seems proper.

Loch, J.—THE order of the Deputy Commissioner in this case is contrary to law. The punishment for murder is, under Section 302 of the Penal Code, death or transportation for life. The Judge trying the case is bound to pass sentence either of death, which sentence requires the confirmation of the High Court before being carried out, or of transportation for life. If the Judge sentence the prisoner to the minor punishment, he must assign his reasons for so doing in the monthly statement submitted to the High Court, as prescribed by Section 380 of the Criminal Procedure Code. The meaning put upon that Section by the Deputy Commissioner is not correct. It does not authorize a Sessions Judge to sentence a prisoner convicted of murder to anything less than transportation for life; but if a prisoner be convicted of murder, and the Judge, instead of sentencing him capitally, sentence him to transportation for life, it requires the Judge to explain his reasons for so doing. If there are circumstances which render a mitigation of the sentence required by the law to be passed in such cases expedient or advisable, the Judge may record those circumstances, and submit them for the consideration of Government, and the Government, under the provisions of Section 54 of the Code of Criminal Procedure, may act as to it seems proper.

I would, under the provisions of Section 405 of the Code of Criminal Procedure, quash the sentence as illegal, and pass a sentence of transportation for life upon the prisoner, leaving the Judge or the prisoners to follow the course indicated above for a mitigation of the sentence.

Glover, J.—I concur with Mr. Justice Loch in quashing the Judge's sentence and in passing one of transportation for life on all the prisoners.

The 2nd May 1864.

Present:

The Hon'ble G. Loch, C. Steer, and F. A. Glover, *Judges.*

Dacoity—Receiving stolen property.

Criminal Appellate Jurisdiction.

Bhyrub Seal and Koobeer Chung, *Appellants.*

A person convicted of and sentenced for dacoity, cannot also be convicted of and sentenced for receiving or retaining the stolen property thereby acquired (Loch, J. dissenting.)

Steer, J.—BHYRUB confessed the dacoity, and there is other very good circumstantial evidence against him.

There is also good evidence against Koobeer on the charge on which he has been convicted.

The Judge convicts Bhyrub of dacoity, and sentences him to 10 years' transportation; and he further convicts him of the offence of receiving stolen property, and sentences him to rigorous imprisonment for 3 years, which sentence is to have effect after the term of the transportation.

Koobeer has been convicted of the offence of receiving stolen property and sentenced to 5 years' rigorous imprisonment. With the conviction and sentence of this prisoner, I would not interfere.

As regards Bhyrub, he has been wrongly convicted and sentenced on the second count, as the property with the guilty receipt of which he is charged was acquired by the dacoity, and the receipt was part of the offence of dacoity, and not a separate offence. I think, therefore, that the separate sentence for the charge of receiving stolen property should be struck out, and the sentence of 10 years' transportation only be allowed to stand.

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Loch, J.—In this case there can, I think, be no doubt that the prisoner Bhyrub has been rightly convicted on two counts. The retaining the stolen property in this case is a distinct offence from the dacoity by which it was acquired. Some time elapsed after the dacoity, before the prisoner and his companions were apprehended with the bag of rupees. They appear to have concealed it at first on or near the spot where the dacoity occurred. They then took it in a boat to another place and buried it there, and it was while they were making off, after having marked the place of concealment with a bamboo, that they were captured. I would not interfere with this conviction or the sentence passed on Bhyrub.

Glover, J.—It appears to me that the wording of Section 412 of the Penal Code, under which the prisoner Bhyrub has been convicted on the second count, refers unmistakenbly to persons other than the actual dacoits, or what comes to the same thing, other than the persons proved to have been engaged in the dacoity; and that, where a prisoner can be convicted of the crime of dacoity, he cannot be punished in the same breath for knowingly receiving or retaining the property thereby acquired. The intention of the Legislature in adding a second count to all charges of theft, robbery, &c., was to prevent a criminal escaping when the evidence against him, as to the actual robbery or theft, was not clear enough for conviction; but it did not (as I understand it) contemplate punishing, *quoad* the same offence, the thief as the receiver also, when the parties were the same, as in the case of a dacoit carrying off and retaining his plunder. The one comprehends the other, unless under special circumstances. In this case the possession of the bag of rupees appears to have been continuous on the part of Bhyrub from the time of the dacoity until he was arrested almost immediately after concealing the money (for the second time) in the water, and I therefore concur with Mr. Justice Steer that his retaining the property must be considered as part of, and comprehended in, the original crime by which he obtained it.

The 3rd May 1864.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Land Disputes.

Criminal Jurisdiction.

Case referred under Section 434 Act XXV of 1861, and Circular Order No. 187, dated the 15th July 1863.

Ramdyal and others,

versus

Chinta Moonee and others.

Where there was a dispute as to the actual possession of land, not between two co-proprietors, but between rival ryots,—HELD that, instead of attaching the whole estate under Section 319 of the Code of Criminal Procedure, the Magistrate ought to have settled the dispute as between the ryots.

Loch, J.—It appears to me that the Magistrate has unconsciously gone into the question of right, while he imagined himself to be keeping clear of it. The dispute appears to have arisen from the proprietor of one moiety of the estate giving leases to ryots to cultivate land without the consent of the proprietor of the other moiety, who, of course, would not acknowledge their right to hold the lands unless they attorned to him. As the property is held ijmali, the one proprietor had no legal authority to act in this manner without the consent of the other; but that was not the question before the Magistrate. The case appears to have arisen in this way. The cultivators stated that their occupancy was disturbed. The question for the Magistrate to determine was whether the complainants were or were not in occupancy. If they proved occupancy, that was a sufficient ground for the Magistrate keeping them in possession from whomsoever they borrowed their title. Section 318 of the Code of Criminal Procedure is as applicable to cases of this kind as to that of proprietors. The Magistrate, however, seems to have allowed the element of right to interfere. He saw that one proprietor had no right to act without the consent of the other, and he saw what might have occurred, the possibility of a breach of the peace if something were not done to settle the dispute, and he therefore made the proprietors parties to the case. As, however, the property was confessedly

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ijmali, it was impossible to accept separate and independent possession except here and there, as for example, of a house or garden or orchard; and, of course, no satisfactory conclusion could be come to, on the point of possession. Had he confined his attention to the case of the ryots, he would, though perhaps by a tedious process, have been enabled to determine the fact of their possession, and might have forbidden all interference with them till the disputes of the parties were disposed of in the Civil Court, at the same time leaving the proprietors the option of realizing their rents which they might do for use and occupation even when kubooleuts had not been given.

But I believe the proper course to be taken in such a case is that prescribed by Sections 26 and 27 of Regulation V of 1812, modified by Regulation V of 1827. It is the only method of meeting such a case as this, and the action of those Sections of the law is not confined, as the Magistrate seems to think, to disputes regarding appropriation of rents. The words are very large.—"Inconvenience to the public and injury to private rights having been experienced in certain cases from disputes subsisting among the proprietors of joint undivided estates, whenever sufficient cause shall be shown by the Revenue Authorities or by any of the individuals holding an interest in such estate for the interposition of the Courts of Judicature, it shall be competent &c., &c." The word used is "disputes," a large enough word,—disputes productive either of inconvenience to the public, or injuries to private interests. In this case the latter will undoubtedly suffer. The proper course is for the Magistrate to apply to the Collector to move the Court, and with the sanction of the Judge to appoint a Manager. Where an estate is held "ijmali," and the proprietors are confessedly in possession, the provisions of Section 318 of the Code of Criminal Procedure are evidently inapplicable; and I think the Magistrate's order attaching the property should be set aside, and he be directed to proceed under Regulation V. 1812, as proposed by the Judge.

Jackson, J.—The question at present before this Court is, whether the order of the Magistrate, passed under Section 318 of the Criminal Procedure Code, is legal? The Magistrate states that he was satisfied that disputes likely to lead to a breach of the peace existed concerning certain lands in Mouzah Serampore. He recorded the grounds which led him to this belief, and he called upon all parties concerned in the dispute to attend and give in written statements of their claim as respects the fact of actual possession of the land in dispute. But his subsequent proceedings seem to be erroneous. The real disputants, as regards the actual possession of the lands, were not the zemindars, but the ryots. The zemindars and their representatives for the time being were Mussamut Thorba, owner of 8 annas share, and Mr. Park, owner of 8 annas share, the shares being held undivided and ijmali. Mr. Park had in the previous year been farmer of the whole estate, and, as such, the ryots in possession had cultivated indigo for him. Mr. Park, at the time these disputes arose, was farmer only of an 8 annas share, and the ryots refused to cultivate indigo any longer. He consequently introduced other ryots from other villages and gave them pottahs for his 8 annas share, and these ryots are said to have interfered with the land in the possession of the former ryots. At least the former ryots complained to that effect, while the new ryots asserted that the lands of which they had been granted pottahs were waste and previously uncultivated lands. The Magistrate should, on this case, have decided the dispute as between the old and the new ryots, and the determination of the question would have depended mostly on the fact whether the lands were those of the former ryots included in their jummas, and therefore in their possession, whether uncultivated or not, or whether they were waste lands not included in those jummas. In the former case, the old ryots should have been retained in possession. In the latter, the new ryots might be kept in possession.

But the Magistrate, instead of deciding the dispute as between the ryots, went into the question of the right of Mr. Park to give pottahs of 8 annas share of the land without the concurrence of the owner of the remaining 8 annas shareholder. He seems to have thought that a dispute, as regards possession, existed between the two shareholders, whereas the dispute between them was wholly as regards their rights, and was not in any way on the point of possession. Being unable to decide this question of right, he attached the whole estate under Section 319. Here, in my opinion, he was altogether wrong. Had he decided the dispute as between one of the old ryots and one of the new ryots, there would probably have been an end of all further contention; or if it continued, there would have been no difficul-

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ty in carrying on the decision to the cases of all the ryots.

The Magistrate might also, if he was satisfied that the provision of Regulation V of 1812, Section 26, ought to be brought into force, have applied to the Collector to move the Judge to attach the estate. But this course appears to me to have been unnecessary in this case. The Magistrate had the power to settle the disputes between the ryots, but did not exercise those powers. The orders which he did pass are illegal. In concurrence with Mr. Justice Loch, I reverse those orders.

The Magistrate can either act under Section 318 of the Procedure Code as between the ryots, or move the Collector to apply to the Judge under Regulation V of 1812, Section 26, as he may consider proper. But I do not see how the attachment of the rights of the proprietors can settle the disputes between the ryots.

The 3rd May 1864.

Present:

The Hon'ble G. Loch and E. Jackson,

Judges.

Dacoity with Murder—Transportation—Imprisonment.

Criminal Referred Jurisdiction.

Queen *versus* Rughoo and others.

Convicted by the Judicial Commissioner of Chota Nagpore of murder and dacoity.

If a person concerned in a dacoity unintentionally commits murder, he is liable to punishment under Section 396 of the Penal Code, but he cannot be separately convicted of murder under Section 302, and of committing dacoity under Section 395.

Where the law gives the alternative punishments of death, transportation for life, and rigorous imprisonment extending to 10 years, a sentence of 14 years' transportation is illegal. If the Judge thinks it proper to pass a sentence of transportation short of life, he should pass a sentence of imprisonment for the term fixed by law, and then, under Section 59, change it to transportation for that period.

Loch, J.—The reference in this case has been made to the Court with respect to the prisoner Rughoo, No. 2, whom the Judicial Commissioner has sentenced capitally.

The prisoner Rughoo and eight others were concerned in robbing from the person, attended with severe hurt to two of the parties robbed, and death to the third.

There appears to have been some confusion in framing the charges against them. All the prisoners should have been charged under Section 396 of the Penal Code; whereas Guntoo, No. 1, and Rughoo, No. 2, were charged under Sections 302, 326, 395, and 397, while the other prisoners were charged under Sections 395 and 396.

The Judicial Commissioner very properly amended the charge against Guntoo and Rughoo, and brought them under Section 396.

The case is simply this. Three persons, Sobha, Seo Churn, and Hurry, were returning in the evening from the bazaar, where they had been to sell vegetable and other produce, when they were attacked on the banks of the Poomapani by a gang of 10 or 12 robbers, who, after beating them severely, robbed them of all the little property they had, and made off without having been identified. From the effects of this beating, Hurry is said to have died.

The Police ascertained that the prisoners had been seen together about the time of the robbery, and apprehended Guntoo, Hurkoot, and Hugroo who confessed, delivered up their share of the plundered property consisting of money and clothes, and implicated the other prisoners, who, when apprehended, also confessed and produced property. The prisoners repeated their confessions to the Magistrate, and these confessions are now used as evidence against them.

The Judicial Commissioner, in concurrence with the Assessors, convicts the prisoner Rughoo on counts 1 and 3, *viz.* wilful murder under Section 302, and committing dacoity under Section 395. He convicts him on the former count, because Rughoo, in his confession, admits that he struck the deceased. In this case, however, there was no intention to commit murder. It may be said that the offence comes under Clause 3 Section 300 of the Penal Code; but we have no evidence as to the real nature of the wounds. The Civil Surgeon, after describing the wounds, says that the deceased was suffering from erysipelas of the head and face which had, no doubt, arisen from the injuries he had received; but we are not clearly informed whether the wounds were of such a character that, in the absence of disease, they would, in the ordinary course of nature, have proved fatal. We think the prisoner should have been convicted under Section 396, and we convict him accordingly; but not consider-

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ing that this is a case which calls for the extreme punishment of the law, we sentence him to be transported for life.

From the report of the Judicial Commissioner before us, it appears that, of the other prisoners, he has sentenced three to transportation for life, and five to transportation for 14 years.

The Court point out to the Judicial Commissioner that the law gives the alternative punishments, *viz.* death or transportation for life or rigorous imprisonment which may extend to 10 years. Should the Judicial Commissioner think it proper to sentence the prisoners to transportation for a period short of life, he should sentence them to *imprisonment for the term fixed by the law* for the particular offence, and should then, under the provisions of Section 59, direct that the prisoners be transported for that period. The sentence of 14 years' transportation is illegal, and the Court, accordingly, reduce it to 10 years.

The 11th May 1864.

Present:

The Hon'ble E. Jackson, *Judge.*

Theft in a building—House-breaking by night with intent to commit theft.

Queen *versus* Tincouree.

Convicted by the Sessions Judge of Dacca of theft in a building.

A person may be convicted of theft in a building and of house-breaking by night with intent to commit theft, though, if the Judge considers the punishment for the first sufficient, he need not award any additional sentence for the second.

The prisoner was committed to the Sessions charged with two offences: *first*, theft in a building under Section 380 of the Penal Code; and, *secondly*, house-breaking by night with intent to commit theft under Section 457 of the Penal Code. The Sessions Judge and the Assessors have found the prisoner guilty of the first, which is the lesser offence; but no opinion is recorded as to his guilt on the second offence, which is far the more serious of the two. The Judge should have recorded a finding and judgment on the second offence charged as well as on the first; though if he considered seven years' transportation a sufficient sentence, he need not have awarded any additional sentence on the second charge.

The prisoner's guilt on both charges is quite clear on the evidence, and his appeal is rejected.

The 12th May 1864.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Murder—Grievous Hurt.

Queen *versus* Mahomed Hossein.

Convicted by the Sessions Judge of Backergunge of murder.

In order to convict a person of murder arising out of grievous hurt, it is indispensable that the death should be clearly and directly connected with the act of violence.

Glover, J.—I do not think that this conviction can stand. That the prisoner wounded the deceased Omed Allee with a *dao* is satisfactorily proved; but there is nothing beyond conjecture to show that death resulted from the injuries then caused. The wound was inflicted in September, whereas the deceased did not die till the following February—two months and a half or thereabouts after; and in the meantime he absconded from the hospital, where he was undergoing medical treatment, and made his way home.

I admit that his having so refused medical treatment would not alter the culpability of the party wounding him if death could be clearly traced to the injury inflicted, but there is no proof that it was so. The Civil Assistant Surgeon states that the wound was the probable cause of death; but as the body was much decomposed when he examined it, he could not state of what positive disease the deceased died; whilst the fact of so long a time having elapsed between the wounding and the death, and that the deceased was so far from being enfeebled by his injuries as to be able to abscond from the hospital, would seem to point to some other intervening cause.

In a case like this, it is indispensable that the death should be clearly connected with the act of violence, "not merely by a chain of causes and effects, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances."

I am not satisfied, therefore, that the deceased's death was the direct result of the blow inflicted on him by the prisoner, and I would annul the conviction of murder, sentencing the prisoner on the third count, for "voluntarily causing grievous hurt," &c., to seven years' rigorous imprisonment.

Seton-Karr, J.—The petition of appeal is, to a certain extent, correct in stating that the Judge's decision should begin by stating the case for the prosecution and as against

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the prisoner, before stating what the prisoner's defence was, or how it had failed.

Nevertheless, on looking at the evidence, I consider it fully proved that the prisoner wounded the deceased severely, after the prisoner had gone to the house of a widow under circumstances which raise a suspicion that he went there for an improper purpose, and was, no doubt, when he found the house surrounded ready for mischief.

I concur with Mr. Justice Glover in thinking that the conviction should be for grievous hurt, as the death is not shewn to be so directly owing to the wounds as it ought to be shewn.

The sentence should, therefore, be reduced to seven years' rigorous imprisonment.

The 19th May 1864.

Present:

The Hon'ble W. S. Seton-Karr and E. Jackson, *Judges.*

Witnesses (Examination of).

Queen *versus* Charroo and another.

Convicted by the Sessions Judge of Backergunge of voluntarily giving false evidence, with intent to procure a conviction of an offence.

A Sessions Judge must form his opinion on the evidence taken before him, and cannot act on depositions recorded before his predecessor. If the Judge who recorded some of the depositions of the witnesses on a Sessions trial, is obliged to leave the district before he can conclude the trial, his successor must re-commence the trial *de novo.*

Jackson, J.—I FIND that the Sessions Judge who convicted the prisoners and passed sentence upon them, did not hear the evidence of the greater portion of the witnesses. The trial was commenced by Mr. Buckle as Sessions Judge on the 28th December. He examined nearly all the witnesses for the prosecution. But important witnesses were absent, and he deferred the trial for their attendance. In the meanwhile he left the district, and Mr. Tucker, the new Sessions Judge, recorded the evidence of the remaining witnesses on the 13th January, and convicted the prisoners.

I am of opinion that such a trial is informal and illegal, and that the conviction must be quashed and a fresh legal trial held.

There is no direct rule laid down in the Code of Criminal Procedure for such a contingency as here occurred. But there can be no doubt that the Sessions Judge must form his opinion on the evidence taken before him, and cannot act on depositions recorded before his predecessor. If the Judge who recorded some of the depositions of the witnesses on a Sessions trial is obliged to leave the district before he can conclude the trial, his successor must re-commence the trial *de novo.*

I would also add that I have considered the evidence as recorded against the prisoners and am far from satisfied that the prisoner's guilt is sufficiently proved. I remark that many of the witnesses who depose to Charroo's presence at the execution of the disputed deed of sale admit that they had never seen him previous to that date. I should hesitate very much to accept their evidence as good against him. I also remark that no enquiry has been made as regards the delivery of the title deeds, namely, the dakhillas, upon which there is direct issue joined between the purchaser and the prisoner Charroo, the former asserting that he received them, and the latter that he still holds them. The question as to whether possession was given under the deed is also important in ascertaining the genuineness of the document. It is stated that Ashgur, one of Charroo's co-sharers, had previously dispossessed Charroo of his share. This point has not been looked to.

Looking solely to the evidence recorded, I would acquit the prisoner; but if another Judge is of opinion that a fresh trial should be held, orders can be passed to that effect.

Seton-Karr, J.—On the whole I am of opinion that there ought to be a new trial before the present Judge. There is ample evidence to go to a Jury or to Assessors, and, as my colleague justly remarks, several rather material points have not been enquired into.

I do not see why Mr. Buckle left the district without finishing this trial. The delay between the 28th of December and the 13th January was not great, and he might very well have waited for the additional evidence which he had sent for.

The proceedings should be quashed, and a new trial be held *de novo.* If the Judge convicts, he will, of course, consider the period of imprisonment already undergone.

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The 3rd June 1864.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Summons (Issue of).

Miscellaneous Case.

Huronath Roy, *Petitioner.*

A complainant's deposition must show some grounds for proceeding before a Magistrate can legally issue a summons.

Jackson, J.—THE question raised before us on this application is as to the legality of the issue of a summons on the applicant Huronath Roy by the Joint Magistrate of the 24-Pergunnahs. The application was at first made before Mr. Justice Loch, who, under Section 434 of the Procedure Code, sent for the papers; and we are now asked, under Section 404 of the Code, to declare the issue of the summons on the applicant illegal.

We think that the Joint Magistrate had no sufficient ground for proceeding against Huronath Roy on the written complaint preferred by Baboo Prannath Roy Chowdhry, or on the examination of his mooktear Faqueer Chand. Looking at that complaint as one then and there instituted by Baboo Prannath Roy Chowdhry for the first time, —and the greater portion of it was certainly then for the first time preferred, though a portion of it may have already formed the subject of enquiry before the Joint Magistrate, it was necessary under the law, Section 66 of the Procedure Code, that the complainant shall be examined upon solemn affirmation to the facts of that complaint. The Baboo, it may be because he could not speak to the facts of the complaint in person, appointed a mooktear to act for him. His examination was taken; but it does not appear from that examination that he is acquainted with any of the facts on which the charge is based. He deposed to nothing which was within his own knowledge; and there is not in his application any ground of proceeding whatever against the petitioner Huronath Roy. The issue of summons against him is consequently illegal. This Court would not, if there was the very slightest ground for proceeding, interfere with a Magistrate's order in issuing his summons; but the complainant's deposition must show some grounds. It is not sufficient that a complainant deposes that he believes certain persons have committed theft or forgery, to enable a Magistrate to issue a summons against them. The complainant must show that he has some grounds for that belief. As a general rule, it remains with the Magistrate to decide whether the grounds for proceeding under Section 67 of the Code of Criminal Procedure are sufficient. In this case, however, we are clearly of opinion that there were not in the complainant's petition or his witness's deposition any ground whatever for proceeding against Huronath Roy.

It is suggested by the Counsel for the complainant that the Joint Magistrate may have acted under Section 68 of the Proce-

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dure Code on the information which came to his knowledge from other enquiries which he had instituted under the direction of the Civil Court.

We think that if the Magistrate had had ground for proceeding against Huronath Roy on those enquiries, he would have issued his summons in them. But he apparently could obtain no evidence and no ground for proceeding against Huronath Roy in that enquiry. He did not close those enquiries, and he appears to have passed no written order as to whether he should continue the enquiry or not. The record of that enquiry is distinct from the record of the complaint preferred by Baboo Prannath Roy Chowdhry. The summons was not issued in that enquiry, but on the separate complaint of Baboo Prannath Roy Chowdhry, which included several charges upon which the Magistrate had not been directed by the Civil Court to make any enquiry, but which were put forward for the first time in this complaint of Baboo Prannath Roy Chowdhry. We are from all these facts confirmed in our opinion that the summons, which it is now sought to have set aside as illegal, was issued under Section 67 of the Procedure Code on the complaint of Baboo Prannath Roy Chowdhry, and on the examination of his mooktear; and as that examination does not contain any ground whatever for proceeding against Huronath Roy, we are of opinion that the issue of such summons was illegal.

The day fixed for the attendance of Huronath Roy on the summons having passed by, it is sufficient that we should declare our opinion on the point. The Magistrate, before issuing any fresh summons on the parties charged by Baboo Prannath Roy Chowdhry, will examine him, or any person whom he may designate as acquainted with the facts, as to the grounds on which he prefers his charge, and will not issue summons unless, at least, some sufficient grounds are shewn for proceeding.

We would add that even the order of the Civil Court contained no ground for proceeding against any particular person; but it was left to the Magistrate to make enquiries and to act against any person against whom he should have grounds for proceeding.

Mr. Newmarch, at the close of the case, expressed an opinion that this decision would be a great hindrance to the arrest of offenders, and that a Magistrate ought to be able to issue a summons on a mere charge without making any previous enquiry.

But the law is imperative. The Magistrate must examine the complainant in the same manner, as if he were a witness, on solemn affirmation. He must, therefore, examine him on facts which are within his personal knowledge, and he can only issue a summons if there are sufficient grounds for proceeding. He may also act without any complaint, if he has knowledge of an offence having been committed; but that is not the case here.

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Mr. Newmarch's client, Baboo Prannath Roy Chowdhry, would strongly object if the Magistrate of the 24-Pergunnahs, solely on the deposition of any person who chose to say that he believed Baboo Prannath Roy Chowdhry had committed theft or forgery, or any other disgraceful crime, without enquiring whether there was any ground for the charge, issued a summons against him and forced him to leave his house and attend Court at a distance of two hundred miles. He would think it very unjust, and under the law such an order would be illegal.

The 6th June 1864.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Section 59 Penal Code—Transportation in lieu of Imprisonment.

Queen *versus* Prem Chund Ousowal and others.

Committed by Mr. F. Walker, Deputy Magistrate of Serajgunge, and tried by Mr. C. S. Belli, Sessions Judge of Rajshahye, on a charge of counterfeiting coin, and convicted of the abetment of the alteration of coin and passing such altered coin as genuine, &c.

Under Section 59 of the Penal Code a Court can sentence to transportation only in a case in which the offence is punishable with imprisonment for 7 years or upwards. It may, in passing sentence for the offence, commute the imprisonment to transportation; but it cannot commute the sentence after the sentence of imprisonment has been passed.

Jackson, J.—The prisoners have been convicted of the offences of coining and passing gold mohurs. The evidence against them is very clear, and their own answer to the charges before both the Sessions Judge and the Magistrate shew that the evidence is true.

But the sentences on prisoners Nos. 2 and 3 in this case are, as suggested by Mr. Justice Trevor in the monthly statement, illegal. The Judge has not authority to apply Section 59 of the Penal Code to the case of these prisoners. The offences of which they have been found guilty are for each offence punishable with smaller terms of imprisonment than seven years.

Section 59 says that in every case in which an offender is punishable with imprisonment for a term of seven years or upwards, the Court, in sentencing such offender, may award transportation instead of imprisonment.

The words in the first clause of the sentence appear at first sight to bear out the Sessions Judge's view of the law. They allude to offenders, and not to offences, and an offender may be one who commits several offences. But the restriction in the first clause of the sentence is to be found in the concluding clause in the words "the Court which sentences such offender, instead of awarding imprisonment, may sentence to transportation." The Penal Code must be read with the Procedure Code. The latter Code in Chapter XXVI, Section 382, lays down that the Court must pass sentence for each offence separately. If this procedure is observed, the Cou t can sentence to transportation only in a case in which an offence is punishable with a term of seven years. It may, in passing sentence for the offence, commute the imprisonment to transportation. It cannot commute the sentence after a sentence of imprisonment has been passed,

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and it follows it cannot commute it at all except for offences for which the law awards seven years' imprisonment or upwards.

I would, therefore, alter the sentence on prisoners 2 and 3 to rigorous imprisonment.

I remark that the prisoners made certain statements by way of confession before the Deputy Magistrate, Mr. Walker; but the record contains no English memorandum of their statements, as it should have done.

Glover, J.—I concur with Mr. Justice Jackson.

The 9th June 1864.

Present:

The Hon'ble W. S. Seton-Karr and G. Campbell, *Judges.*

Murder.

Queen *versus* Kewul Dosad.

Committed by Mr. J. Coombe, Officiating Magistrate of Monghyr, on a charge of culpable homicide, but tried and convicted by Mr. J. W. Dalrymple, Sessions Judge of Bhagulpore, of the offence of murder, &c.

A conviction for murder was held to be wrong in a case where a prisoner, taking advantage of an incident which occurred in what till then had been a fair fight, struck his opponent and knocked him over.

Campbell, J.—I AM decidedly of opinion that the conviction for murder is wrong, and that the Magistrate was right in committing for culpable homicide only. I think it far too great a refinement on the part of the Judge to say that prisoner took undue advantage within the meaning of the law, because in the heat of the fight two other persons ran up to assist prisoner. That would be applying an English Public School Code of Honor to such case in a way which I do not think that the Code contemplated. They did not get deceased down and then deliberately beat out his brains. The fight was going on, both parties being armed with *lattees*, and probably prisoner was getting the worst of it when his cries for assistance brought re-inforcements, and in the onslaught by the party thus re-inforced prisoner hit deceased with his *lattee* and knocked him over. I think that was clearly done without premeditation in a sudden fight in the heat of passion upon a sudden quarrel. Moreover, according to the Judge's finding, there were special circumstances of mitigation of prisoner's conduct, since he says that the deceased "drove his "buffaloes into the adjoining village of "Chuteeanee to graze. The prisoner Kewul, "who is chowkeedar of Chuteeanee and "also gorait, and whose special business "therefore it is to prevent the trespass of "cattle on the lands of his village, on see-"ing this, came forward." If the trespass be proved, there would be a right of private defence; but that right could not, in such a case, extend to the taking of life. I think that the case is one of culpable homicide with extenuating circumstances (the trespass being found by the Judge). I would reduce the offence to culpable homicide and the sentence to two years' rigorous imprisonment.

Seton-Karr, J.—I concur with Mr. Justice Campbell. The prisoner should *not* have been found guilty of murder, for taking advantage of an incident which occurred in what till then had been a fair fight. I think that a sentence of two years' imprisonment is somewhat light for the offence of which the prisoner should have been found guilty; but, on the whole, I agree to the reduction.

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The 2nd July 1864.

Present:

The Hon'ble G. Loch and L. S. Jackson,

Judges.

Issue of Summons—Examination of complainant.

Reference under Section 434 *of the Code of Criminal Procedure by Mr. A. E. Russell, Sessions Judge of Moorshedabad.*

Rujeeb Mundle *versus* Lochun Mundle and others.

The Deputy Magistrate was held to have been wrong in summoning the parties charged before examining the complainant.

Loch, J.—THE Deputy Magistrate was wrong in summoning the parties charged, before the complainant had been examined on oath or solemn affirmation. The Deputy Magistrate might either have examined the complainant himself; or if he thought that that was a duty to be performed by the Magistrate receiving the complaint, he might have returned the petition to that officer, and requested him to do what the law required of him. As the parties were summoned illegally but without any fault on the part of the complainant, he should not be made to suffer, and I concur with the Sessions Judge in thinking that the fine should be remitted.

The course to be followed in cases of this kind has been laid down in para. 2 of the Circular Order 6 of 1834, to which the Judge will draw the attention of the Deputy Magistrate for his future guidance.

Jackson, J.—It seems to me that the Deputy Magistrate was quite wrong in this matter.

Assuming that the officer called the "Joint Magistrate," not being Magistrate of the District or in charge of a Division of a District, is competent to refer cases to other Magistrates having full powers (a point which appears to me exceedingly doubtful) he can refer a case in any stage, and the Magistrate receiving the case is to be guided (Section 275) by the rules prescribed for the Magistrate of the District in similar cases.

The Deputy Magistrate, therefore, finding a case referred to him, in which merely the complaint had been preferred, but the complainant had not been examined, should have himself proceeded, in accordance with the "rule prescribed for the guidance of the Magistrate of the District," to take the examination.

The Deputy Magistrate says that in his opinion this function belongs under the wording of Section 66 to the Magistrate before whom the complaint is preferred, and to no other Magistrate; but if this be true, so also does the function of issuing the summons under Section 67. But the Deputy Magistrate in this case issued the summons. If he could do the one act, he could also do the other.

I think, therefore, that the Deputy Magistrate misconceived his duty in supposing that it was not his business to examine the complainant; but if it had been otherwise, and if the Deputy Magistrate observed that a preliminary step required by law had been omitted, and thought that he could not himself supply the defect, it is plain that he might, as suggested by the Sessions Judge, have moved the Joint Magistrate to do what he should have done in the first instance.

In any case the complainant ought not to be made to pay the expenses of so large a number of defendants, who apparently would never have been summoned at all if

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the provisions of the law had been complied with.

The tone of Mr. Lingham's explanation is in my opinion unduly dogmatic, and shows less deference for the opinion of a superior Court than is becoming.

The 5th July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Whipping (only in lieu of other punishment).

Queen *versus* Abdool Khidmutgar.

Convicted by the Cantonment Joint Magistrate of Barrackpore of theft, and sentenced under Section 381 *of the Penal Code to* 6 *months' rigorous imprisonment and to be whipped: referred to the High Court by the Sessions Judge of the* 24-*Pergunnahs at the instance of the Magistrate.*

In the case of adults on a first conviction, or in the case of juvenile offenders whether for a first or any other offence, whipping can only be *in lieu* of any other punishment.

Seton-Karr, J.—Both whipping and imprisonment cannot be legal in this case. The whipping should have been in lieu of the imprisonment, or the imprisonment should have been the sole punishment.

It would seem that the sentence of whipping should be annulled, as some portion of the imprisonment has been already undergone. Otherwise, the offender being juvenile, it were desirable that the whipping should have been inflicted.

Loch, J.—As this appears to be a first conviction, it is evident that, by Section 2 Act VI of 1864, the whipping must be *in lieu* of any other punishment prescribed by Section 381 of the Penal Code.

Juvenile offenders, whether for a first or any other offence, may be punished with whipping *in lieu* of any other punishment.

As the prisoner has been imprisoned some time, the whipping cannot now be inflicted, and that part of the sentence must be quashed.

The 11th July 1864.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Examination of witnesses.

Queen *versus* Kanye Sheikh.

Convicted by the Sessions Judge of Nuddea of voluntarily causing grievous hurt.

Whenever a prisoner is put upon his trial, he is entitled to have the witnesses examined *de novo* if they have previously given evidence on the trial of another prisoner in the same case; and it is not sufficient to require the witnesses to identify the prisoner and to read over to them their former examination and require them to attest it.

Loch, J.—This Court has ruled on several occasions that, whenever a prisoner is put upon his trial, he is entitled to have the witnesses examined *de novo* if they have previously given evidence on the trial of another prisoner in the same case, and that it is not sufficient to require the witnesses to identify the prisoner and to read over to them their former examination and require them to attest it. The Sessions Judge has, however, in this case merely read over their previous examination to the witnesses, allowing the prisoner to cross-examine them, and has required them to identify the prisoner, which they have done. Before the Code of Criminal Procedure came into force, such was the usual mode of conducting these supplementary trials; but as it has since been held to be illegal, the proceedings in this case must be quashed, and orders issued for a new trial under Section 405.

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The 19th July 1864.

Present:

The Hon'ble G. Loch, W. S. Seton-Karr, and E. Jackson, *Judges.*

House-breaking by night—Dacoity.

Queen *versus* Rewut Rajwar and another.

Convicted by the Sessions Judge of Behar of dacoity with murder.

Five men armed were discovered committing an act of house-breaking by night. One of the party was engaged in cutting a hole through the wall, while the others stood on guard. When the alarm was given, the neighbours ran up, and one of the robbers cut down one of the villagers, and the robbers effected their escape, not however before two of them were identified, the prisoners in the case. HELD by the majority of the Court that the crime of which the prisoners were guilty was house-breaking by night and not dacoity.

Jackson, J.—THE prisoners have been convicted of dacoity with murder and sentenced to transportation for life. This crime is punishable with death; and if dacoity is so rife in the district of Behar and requires to be put down with the high hand, as the Judge says, the circumstances of this case would have justified such a sentence.

The Sessions Judge has not, in accordance with Section 380 of the Procedure Code, stated the grounds upon which he remitted the punishment of death. His attention is drawn to this Section.

The evidence in this case is to the effect that the prisoners and three others were engaged in the offence of house-breaking at night; and on being surprised and surrounded, they made use of their weapons, a ghorassa and a lohabunda, with such effect that they killed one man, and succeeded in escaping. All the persons present at the time of their discovery, and at the attempt to capture them, have deposed that they recognized the prisoners. If this evidence is true, it is ample for the conviction of the prisoners.

The Judge and the Assessors who had the best opportunity of judging of its truth, believed it in preference to the evidence to the *alibi* which the prisoners urged in their defence. I will not interfere with their finding, as it is not shown that the witnesses had any reason for charging the prisoners falsely; and as it is shewn that the witnesses deposed the next day at the thannah that they had recognized the prisoners, and as under the circumstances of the cases, there was room for recognition.

I doubt however whether the offence of which the prisoners have been held guilty, is that of dacoity with murder. To constitute dacoity, five or more persons must join and commit or attempt to commit a robbery (Section 391). To constitute robbery, there must be a causing or attempt to cause hurt or death in order to the committing of theft or in committing the theft (Section 390).

In this case the prisoners were committing the offence of house-breaking probably with intent to commit theft afterwards. But they had not completed breaking into the house, and had not committed the theft, and it cannot be said that the violence was caused in order to the committing of the theft, or in committing the theft. It was used to enable the criminals to escape. If then the prisoners were not committing robbery, they were not committing dacoity. They were committing the offence of house-breaking by night, in order to the commision of theft (Section 457) having made preparation for causing hurt (Section 458), and they committed the offence of causing death whilst committing house-breaking (Section 460). I consider that these terms are wide enough to include the assault made by the prisoners when surprised in the act of house-breaking and seized. Under this last Section, the prisoners are punishable with transportation for life. I would confirm the sentence passed on the prisoners under this Section.

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The sentence passed on the prisoners is also good on the offence of murder under Section 304 of the Penal Code.

Seton-Karr, J.—I would allow this sentence to stand as it is, the more so as the provisions of Section 426 of the Code of Criminal Procedure expressly meet the difficulty raised by my colleague. No "error or defect" prejudicial to the appellants is shown to have occurred. They have not been sentenced to "any larger amount of punishment" for dacoity, of which my colleague thinks them not guilty, than they might be for grievous hurt, of which he thinks they "ought on the evidence to have been found guilty." And consequently under the Section and words quoted, the finding or sentence need not be "reversed or altered" on appeal or revision.

But I also think that there was enough, on the evidence of the acts done by the accused, to justify the Judge in convicting of dacoity. He may be supposed to have held that the appellants came to the spot armed and ready for any violence, and that the violence which they displayed, was displayed in order to the committing of the abstraction of the property, or in actually committing such abstraction, and as a consequence of their original intention.

In either view of the case I hold the alteration proposed to be unnecessary. It is no reduction of the sentence passed.

Loch, J.—Five men armed were discovered committing an act of house-breaking by night. One of the party was engaged in cutting a hole through the wall, while the others stood on guard. When the alarm was given, the neighbours ran up, and one of the robbers cut down one of the villagers with a ghorassa, and the robbers effected their escape, not however before two were identified. These two have been apprehended and brought to trial, and my colleagues consider the evidence of recognition in this case to be credible and have accepted it.

The case comes before me on a law point. The prisoners were charged with dacoity and murder, and having been convicted of that offence, have been sentenced to transportation for life.

Mr Justice Jackson thinks that the prisoners have been wrongly charged with dacoity: 1*st*, because there was not a sufficient number of persons engaged in the offence to constitute that crime; 2*ndly*, the crime was not "robbery" as defined in the Code; but he thinks that they were committing the offence of house-breaking by night as defined in Section 457 after having made preparation for causing hurt (Section 458) and they committed the offence of causing grievous hurt whilst committing house-breaking (Section 459), and he would sentence them under that Section.

Mr. Justice Seton-Karr would let the sentence stand under Section 426.

I agree with Mr. Justice Jackson in thinking that the crime of which the prisoners are guilty is house-breaking by night and not dacoity, though as the evidence proves that five men were present, this number, if the offence depended merely on number, would be sufficient. Dacoity, however, is only robbery committed by more than a certain number of robbers, and the definition of robbery in Section 390 "theft is robbery" does not suit this case. It comes under the definition of house-breaking (Section 445), for the accused, when discovered, were engaged in making a passage into the house, which the owner of the house never intended to be made, and certainly was never likely to use, and then when surprised, they attacked the villagers who had assembled; and after killing one of them made their escape. Section 460 applies to this case. "If at the "time of the committing of house-breaking "by night any person guilty of such offence "shall cause death to any person, every "person jointly concerned in such house-"breaking by night shall be punished with "transportation for life," &c; and under this Section I would convict the prisoners, which the provisions of Section 426 enables the Court to do, though the prisoners have been tried and found guilty on a charge of dacoity and murder.

It would save the High Court considerable labor if the Sessions Judges would take the trouble to ascertain either before commencing or in the course of a trial that the charge against the prisoners is correctly drawn up with reference to the evidence for the prosecution.

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an admission must be taken with
entirely does not apply to pleadings.
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